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IN THE

Supreme Court of the United States

OCTOBER TERM, 1935.

No. 497

ST. JOSEPH STOCK YARDS COMPANY,
Appellant,

vs.

UNITED STATES OF AMERICA AND SECRETARY OF AGRICULTURE,
Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI, ST. JOSEPH DIVISION.

BRIEF FOR APPELLANT.

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January, 1936.

THE GUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

INDEX.

	PAGE
Opinions	1
Appendix to the Brief	2
The Statutes Involved (and pp. 1-9, inc., of Appendix to the Brief)	3
Specification of Assigned Errors Intended to be Urged	3
Statement of the Case	4
Summary of the Argument	7

The Argument.

I. The District Court erred in Declining to Exercise Its Independent Judgment upon the Law and the Facts as Disclosed by the Record before the Secretary and the Court in a Case Involving Confiscation.	10
The Question of Confiscation Is Squarely in Issue	11
Importance of the Question	15
Conflict of Decisions in District Courts	15
Similar Litigation Is Arising	17
An Unbroken Line of Decisions of this Court Indicates the Error of the District Court	18
II. Summary of Certain Additional Grounds for Reversal of Decree	23
A Prerequisite to the Reduction of Rates Is Evidence Which Will Support a Finding that Present Rates Are Unreasonable	24
An Order Made without Evidence, or upon Evidence Which Clearly Does Not Support It, is Void	25

The Prescribed Rates Must Be Reasonable, and the Condemned Rates Unreasonable, at the Time of the Hearing 26

The Decision Is Void if It Does Not Contain Basic or Essential Findings Which Support the Order 27

The Order Is Void if Based upon Mere Prophecy 28

III. The Order Is Void Because the Findings Necessary to Support It Are Not Stated in the Decision of the Secretary; Nor Are Such Findings Supplied in the Decision of the District Court..... 29

Basis for the Finding of Unreasonableness.... 29

The Decision Contains No Findings Respecting Appellant's Net Operating Income..... 31

The Decision Contains No Findings to Support Specific Reductions 33

The Decision Contains No Findings Which Support Certain Proposed Increases..... 35

The Decision Contains No Specific Findings Concerning Diminishing Receipts..... 36

The Decision of the District Court Does Not Contain Specific Findings of Fact upon Most Points 37

IV. The District Court Erred in Failing to Find that the Order Was Void Because Appellant's Rates and Charges Were Not Unreasonable at the Time of the Hearing 39

Essential Facts in Connection with this Point.. 39

Verification of Preceding Statements of Fact.. 39

Confiscatory Return if Prescribed Rates Had Been in Effect 45

Secretary Lacked Jurisdiction to Make Order.. 46

V. The District Court Erred in Failing to Find that the Rates Prescribed by the Secretary Would Not Have Produced a Fair or Non-confiscatory Return upon the Fair Value of Appellant's Property Used and Useful for Stockyards Purposes During the Period of Six Years Prior to the Hearing Considered by the Secretary in his Decision 46

Comparisons of Rate Reductions under First and Present Decisions 47

Propriety of Use of First Decision as Basis for Value 1927-1931 47

Value of Appellant's Property 1927-1931 50

Analysis of Operating Revenues and Expenses 1927-1931 51

Prescribed Rates Would Have Been Confiscatory During Entire Period Considered by Secretary 58

Facts Stated Dispose of Government's Contention as to Excessive Amount of Depreciation Reserve 59

VI. The Specific Reductions in the Rates and Charges Prescribed by the Secretary Are Arbitrary, Based Upon No Findings in the Decision, Not Supported by any Evidence of Record, and Are Therefore Void .. 60

The Inept Changes Prescribed in Appellant's Rates 64

Authorized Increase in Charges 67

VII. The Decision of the Secretary Was Erroneously Predicated Upon Speculation and Prophecy as to Increased Revenue Which Would Be Obtained by Appellant 69

Yardage Revenue Estimated by Secretary Compared with 1932 71

Resale Charge Estimated by Secretary Compared with 1932 71

Feed Lot Yardage Estimated by Secretary Compared with 1932 71

Revenue from Feed Sale Compared with 1932.. 72

Revenue from Miscellaneous Charges Compared with 1932 72

Summary of Errors in Estimates Compared with 1932 72

VIII. It Was Erroneous, and Contrary to the Indisputable Character of the Evidence, to Base Estimates of Increased Revenue for the Future upon a Study of Six Years, Contrary to the Evidence Which Demonstrates Gradually Diminishing Receipts Throughout the Period Studied 74

Trend of Live Stock Receipts Prior to Hearing. 76

Trend of Appellant's Income Prior to Hearing. 79

Reasons for Diminishing Receipts of Live Stock and Revenues 81

To Base Reduced Rates upon Predictions of Increased Revenue Was Contrary to Indisputable Character of the Evidence and Therefore Arbitrary and Void 83

IX. The District Court Erred in Failing to Find that At the Time of the Hearing Appellant Was Applying a Resale Charge Equivalent to that Prescribed by the Secretary upon All Shipments of Live Stock to Which Such Charge Could Be Applied under the Secretary's Order; That Therefore Appellant Could Not Obtain from Such Charges as Were Prescribed by The Secretary The Increased Revenue Contemplated in the Decision and Order of the Secretary.. 84

X. The District Court Erred in Failing to Find that the Order of the Secretary with Respect to Feed Lot Charges Was Void 93

The Secretary Has Not Prescribed the Feed Lot Charges as a Minimum 94

An Estimate of Increased Income Was Erroneously Predicated upon Increased Feed Lot Charges 94

No Findings to Support the Order of the Secretary 96

No Hearing in Any True Sense..... 97

The Evidence Does Not Support the Conclusion that the Returns from the Feed Lots Are Inadequate for the Results Which the Feed Lots Were Intended to Produce 99

The Finding Is Void Because No Alternative Is Offered as to Removal of Discrimination..... 102

XI. The District Court Erred in Failing to Find that the Value of the Transit House Should Be Included in the Value of Appellant's Property Used and Useful for Stockyards Purposes 104

No Change in Conditions Since First Decision.. 105

Exclusion of Transit House Is Confiscatory.... 107

Operation of Transit House a Matter Within Business Judgment of Appellant's Management 108

XII. The District Court Erred in Failing to Find that Appellant's Property, Used and Useful for Stockyards Purposes, Has a Substantial Going Concern Value, in Addition to the Bare Value of the Land and Structures 109

Facts Relating to Appellant's Going Concern Value 112

Value Fixed by Secretary Includes Nothing More Than Bare Bones of the Property..... 113

The District Court Erred in Stating that the Only Evidence Was by Witness Howson for Petitioner 117

The District Court Erred in Finding that Certain Elements of Going Concern Value Were Included in the Appraisal 120

The District Court Erred in Approving Certain Statements in the Decision of the Secretary.. 121

The Difficulty of Appraising Going Concern Value Does Not Excuse the Denial of a Proper Allowance 122

The Finding Is Arbitrary and, Therefore, Void. 125

This Case Distinguished from Dayton P. & L. Co. v. Public Utilities Commission and Columbus Gas & Fuel Co. v. Public Util. Com..... 127

Conclusion upon Going Concern Value..... 129

XIII. The District Court Erred in Failing to Find that the Cost of Reproduction New of Appellant's Structures, Less Depreciation, as Determined by the Secretary, Was Not Supported by Any Legal Evidence. 130

XIV. The District Court Erred in Failing to Find that the Annual Allowance for a Depreciation Reserve Fixed by the Secretary Was Inadequate, Contrary to the Evidence, Beyond the Statutory Powers of the Secretary, Confiscatory, and Void; and in Failing to Exercise Its Independent Judgment upon the Law and the Facts 134

Error in Opinion of District Court..... 135

Facts Relating to Depreciation Reserve..... 137

Principles Established by This Court Concerning Depreciation Reserve 141

The Amount Allowed by the Secretary Appears to Be Lower Than that Authorized in Any of the Decided Cases 141
The Secretary Has No Statutory Authority to Prescribe the Amount of a Depreciation Reserve 143
This Court Has Never Authorized or Required the Imposition of a Compound Interest Sinking Fund Basis for an Annual Depreciation Reserve 145
The Sinking Fund Method Should Go Only with an Undepreciated Rate Base and the Straight Line Method with a Depreciated Rate Base.. 147
The Structure Dealt with in the Clark's Ferry Bridge Company Case Is Dissimilar to Appellant's Plant 149
The Secretary Has Failed to Make Any Allowance for Tax Deductions in Connection with the Depreciation Allowance 151
The Secretary May Not Lawfully Require Appellant to Invest Money for the Purpose of Earning a Return to Provide an Adequate Depreciation Reserve 152
It Would Be Impracticable to Use the Depreciation Reserve in Additions and Improvements to the Property or in Appellant's Business.. 152
Investment in Interest Bearing Securities Would Be Impracticable 153
Appellant Has Definitely Proved the Necessity for an Annual Depreciation Allowance of Not Less than $100,000 153
The Record Shows the Property Has Not Existed a Sufficient Length of Time to Cause It to Reach a Period of Normal Deterioration.. 155
No Surplus in Depreciation Reserve for Past Years May Be Used as a Basis for Reducing Future Rates 156

Summary of Appellant's Contentions with Respect to Annual Allowance for Depreciation Reserve 157

XV. The District Court Erred in Failing to Find that the Real and True Value of Appellant's Land in Zone A Exceeded the Value Fixed by the Secretary by Approximately $275,000, and in Failing to Exercise Its Independent Judgment upon the Facts and Law.... 159

Failure of District Court to Exercise Independent Judgment upon the Law and the Facts... 159

Scope of Appeal..... 159

Importance of Land Values in Zone A..... 160

The Change in Value Determined by the Secretary Is So Great as to Require Careful Examination 160

No Basis for Finding in the First Decision that Going Concern Value Was Included in Land Appraisal 163

Fundamental Error of Secretary in Present Finding as to Value of Land in Zone A..... 163

The Conclusion of the Secretary Respecting the Belt Sale Is Arbitrary..... 168

The Finding of the Secretary Is Arbitrary Because It Ignores the Finding in the First Decision 171

The Secretary Has Disregarded the Law Announced by This Court Concerning the Elements to be Determined in Fixing Land Values 172

XVI. The District Court Erred in Its Decision Concerning Appellant's Petition for Rehearing before the Secretary..... 176

Facts Relating to Petition to Reopen..... 176

Error Assigned with Respect to Petition for Rehearing 178

The Petition for Further Hearing Should Have Been Allowed..... 180

Cases Cited.

American Commission Co. v. United States, 11 F. Supp. 965 15
Assigned Car Cases, 274 U. S. 564, 71 L. ed. 1204.... 16
Atchison, T. & S. F. R. Co. v. United States, 295 U. S 193, 79 L. ed. 1382.....11, 21, 24, 28
Atlanta, B. & C. R. Co. v. United States, ... U. S. ...., 80 L. ed. (Adv. Ops.) 25..... 22
Baltimore & O. R. Co. v. United States, 264 U. S. 258, 68 L. ed. 667..... 180
Beaumont, S. L. & W. R. Co. v. United States, 282 U. S. 74, 75 L. ed. 221.....23, 25, 27
Bluefield W. W. & Improv. Co. v. Public Service Com., 262 U. S. 679, 67 L. ed. 1176.....10, 19, 110
Board of Public Utility Com'rs. v. Elizabethtown Water Co., 43 F. (2d) 478..... 112
Board of Public Utility Comrs. v. New York Teleph. Co., 271 U. S. 23, 70 L. ed. 808..23, 26, 45, 57, 58, 152, 156
Brooklyn Borough Gas Co. v. Prendergast, 16 F. (2d) 615 .....109, 112
Brooklyn Union Gas Co. v. Prendergast, 7 F. (2d) 628. 111
Chesapeake & Potomac Telephone Co. v. West, 7 F. Supp. 214.....21, 142
Chicago, M. & St. P. R. Co. v. Polt, 232 U. S. 165, 58 L. ed. 554..... 97
Chicago, R. I. & P. R. Co. v. United States, 284 U. S. 80, 76 L. ed. 177.....10, 20
Citizens' Gas Co. v. Public Service Commission, 8 F. (2d) 632.....109, 111
City of Minneapolis v. Rand, 285 Fed. 818..... 111
Clark's Ferry Bridge Co. v. Public Service Commission, 165 Atl. 261..... 150

Clark's Ferry Bridge Co. v. Public Serv. Com., 291 U. S. 227, 78 L. ed. 767 ..... 141, 142, 147, 149, 157
Columbus Gas & Fuel Co. v. City of Columbus, 17 F. (2d) 630 112
Columbus Gas & Fuel Co. v. Public Utilities Commission, 187 N. E. 7 128
Columbus Gas & Fuel Co. v. Public Util. Com., 292 U. S. 398, 78 L. ed. 1327 ..... 10, 21, 110, 127, 128
Consolidated Gas Co. of New York v. Newton, 267 Fed. 231 108
Consolidated Gas Co. of New York v. Prendergast, 6 F. (2d) 243 111
Crowell v. Benson, 285 U. S. 22, 76 L. ed. 598 ..... 10, 20, 180

Dayton P. & L. Co. v. Public Utilities Commission, 292 U. S. 290, 78 L. ed. 1267 ..... 10, 20, 110, 127, 128
Denver v. Denver Union Water Co., 246 U. S. 178, 62 L. ed. 649 ..... 58, 110
Denver Union Stock Yard Co. v. United States, 57 F. (2d) 735 ..... 15, 92, 107, 109, 112, 123, 125
Des Moines Gas Co. v. City of Des Moines, 199 Fed. 204 111
Des Moines Gas Co. v. Des Moines, 238 U. S. 153, 59 L. ed. 1244 ..... 110, 116
Des Moines Water Co. v. City of Des Moines, 192 Fed. 193 111

Florida v. United States, 282 U. S. 194, 75 L. ed. 291 ..... 23, 27
Florida v. United States, 292 U. S. 1, 78 L. ed. 1077 16
Florida E. C. R. Co. v. United States, 234 U. S. 167, 58 L. ed. 1267 ..... 23, 25, 180
Fort Worth Gas Co. v. City of Fort Worth, 35 F. (2d) 743 142

Galveston Electric Co. v. Galveston, 258 U. S. 388, 66 L. ed. 678 110
Goldfield Consol. Water Co. v. Public Service Com'n., 236 Fed. 979 111

Great Northern R. Co. v. Minnesota, 238 U. S. 340, 59 L. ed. 1337 ..... 23, 25, 74
Greencastle Water Works Co. v. Public Service Commission, 31 F. (2d) 600 133

Idaho Power Co. v. Thompson, 19 F. (2d) 547 112
International Ry. Co. v. Prendergast, 1 F. Supp. 623 .. 112
Interstate Commerce Com. v. Louisville & N. R. Co., 227 U. S. 88, 57 L. ed. 431 ..... 16, 23, 25, 133, 179
Interstate Commerce Com. v. Northern P. R. Co., 216 U. S. 538, 54 L. ed. 608 ..... 23, 24

Kansas City Southern Ry. Co. v. United States, 19 F. (2d) 591 112
Kings County Lighting Co. v. Prendergast, 7 F. (2d) 192 111
Knoxville v. Knoxville Water Co., 212 U. S. 1, 53 L. ed. 371 ..... 10, 18, 109, 141

Lehigh Valley R. Co. v. Board of Public Utility Comrs., 278 U. S. 24, 73 L. ed. 161 ..... 10, 19
Lincoln Gas & E. L. Co. v. Lincoln, 250 U. S. 256, 63 L. ed. 968 110
Lindheimer v. Illinois Bell Teleph. Co., 292 U. S. 151, 78 L. ed. 1182 ..... 10, 20, 59, 143, 145
Los Angeles Gas & Electric Corporation v. Railroad Com'n., 58 F. (2d) 256 148
Los Angeles G. & E. Corp. v. Railroad Com., 289 U. S. 287, 77 L. ed. 1180 ..... 110, 113, 116, 127, 148

McCardle v. Indianapolis Water Co., 272 U. S. 400, 71 L. ed. 316 ..... 23, 26, 110
Merchants Warehouse Co. v. United States, 283 U. S. 501, 75 L. ed. 1227 16
Middlesex Water Co. v. Board of Public Utility Com'rs, 10 F. (2d) 519 111
Minnesota Rate Cases, 230 U. S. 352, 57 L. ed. 1511 . 172, 173
Missouri Ex Rel. S. W. Bell T. Co. v. Public Serv. Com., 262 U. S. 276, 67 L. ed. 981 ..... 23, 26, 108, 145

Missouri, K. & T. Ry. Co. v. Love, 177 Fed. 493..... 111
Mobile Gas Co. v. Patterson, 293 Fed. 208 .....108, 111
Monroe Gaslight & Fuel Co. v. Michigan Public Utilities Com'n, 11 F. (2d) 319 111

New England Divisions Case, 261 U. S. 184, 67 L. ed. 605 16
New York & Richmond Gas Co. v. Prendergast, 10 F. (2d) 167 .....111, 123
Northern P. R. Co. v. Department of Public Works, 268 U. S. 39, 69 L. ed. 836.....10, 19
Northwestern Bell Telephone Co. v. Spillman, 6 F. (2d) 663 109
Norwegian Nitrogen Prod. Co. v. United States, 288 U. S. 294, 77 L. ed. 796.....10, 20

Ohio Valley Water Co. v. Ben Avon Borough, 253 U. S. 287, 64 L. ed. 908.....10, 18
Oklahoma Operating Co. v. Love, 252 U. S. 331, 64 L. ed. 596 .....10, 18
Omaha v. Omaha Water Co., 218 U. S. 180, 54 L. ed. 991 110

Pacific G. & E. Co. v. City and County of San Francisco, 273 Fed. 937 111
Pacific Gas & Electric Co. v. Railroad Commission, 5 F. Supp. 878 .....112, 142
Pacific Telephone & Telegraph Co. v. Whitcomb, 12 F. (2d) 279 .....109, 111, 123
Phillips v. Commissioner of Internal Revenue, 283 U. S. 589, 75 L. ed. 1289.....10, 19
Pioneer Telephone & Telegraph Co. v. Westenhaver, 118 Pac. 354 142
Prendergast v. New York Teleph. Co., 262 U. S. 43, 67 L. ed. 853 .....10, 19

San Joaquin & Kings River C. & I. Co. v. Stanislaus County, 191 Fed. 875..... 142
Schechter v. United States, 295 U. S. 495, 79 L. ed. 1570 .....24, 26

Seaboard Air Line Railway Co. v. United States, 254 U. S. 57, 65 L. ed. 129 16
Skinner & Eddy Corp. v. United States, 249 U. S. 557, 63 L. ed. 772 ..... 16, 103
Southern Bell Tel. & Tel. Co. v. Railroad Com'n of S. C., 5 F. (2d) 77 111
Southern R. Co. v. Virginia, 290 U. S. 190, 78 L. ed. 260 ..... 24, 26, 180
Spring Val. Waterworks v. City, etc., of San Francisco, 124 Fed. 574 110
St. Joseph Stock Yards Co. v. United States, 58 F. (2d) 290 ..... 2, 4, 5, 15, 33, 48, 54, 56, 58, 112, 117, 125, 137, 140, 161, 172
St. Joseph Stock Yards Co. v. United States, 11 F. Supp. 322 ..... 1, 5, 12, 14, 56, 75, 95, 106, 112, 117, 120, 121, 122, 130, 135, 145, 159, 176, 177
St. Louis & O'Fallon R. Co. v. United States, 279 U. S. 461, 73 L. ed. 798 64
Stafford v. Wallace, 258 U. S. 495, 66 L. ed. 735 6
Streator Aqueduct Co. v. Smith, 295 Fed. 385 111

Tagg Bros. & Moorhead v. United States, 280 U. S. 420, 74 L. ed. 524 ..... 3, 6, 22, 23, 26, 103, 178
Telephone and Railroad Depreciation Charges, 118 I. C. C. 295 148
Telephone and Railroad Depreciation Charges, 177 I. C. C. 351 ..... 145, 148
Texas & P. R. Co. v. United States, 289 U. S. 627, 77 L. ed. 1410 103

Union Stock Yards Co. of Omaha v. United States, 9 F. Supp. 864 ..... 15, 63, 126
United Fuel Gas Co. v. Public Service Commission, 14 F. (2d) 209 111
United R. & Electric Co. v. West, 280 U. S. 234, 74 L. ed. 390 ..... 10, 19, 141

United States v. Abilene & S. R. Co., 265 U. S. 274, 68 L. ed. 1016 ..... 133, 180
United States v. Baltimore & O. R. Co., 293 U. S. 454, 79 L. ed. 587 ..... 24, 28
United States v. Butler, ... U. S. ...., 80 L. ed. (Adv. Ops.) 287 184
United States v. Chicago, M., St. P. & P. R. Co., 294 U. S. 499, 79 L. ed. 1023 ..... 11, 21, 24, 28, 97
United States v. Louisville & N. R. Co., 235 U. S. 314, 59 L. ed. 245 16

C. H. Venner Co. v. Urbana Waterworks, 174 Fed. 348 111

West v. Chesapeake & P. Teleph. Co., 295 U. S. 662, 79 L. ed. 1640 ..... 11, 21, 162, 171
West Ohio Gas. Co. v. Public Utilities Com., 294 U. S. 63, 79 L. ed. 761 97
West Ohio Gas Co. v. Public Utilities Com., 294 U. S. 79, 79 L. ed. 773 ..... 11, 21, 24, 28, 36, 58, 69
Western Paper Makers' Chemical Co. v. United States, 271 U. S. 268, 70 L. ed. 941 17
Westinghouse Electric & Mfg. Co. v. Denver Tramway Co., 3 F. (2d) 285 111
Wichita Gas Co. v. Public Service Commission, 2 F. Supp. 792 ..... 112, 124
Wichita Gas Co. v. Public Service Commission, 3 F. Supp. 722 ..... 112, 142

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BRIEF FOR APPELLANT.

OPINIONS.

The decision of the District Court for the Western District of Missouri, St. Joseph Division, from which this appeal is taken (R. 910), is *St. Joseph Stock Yards Co.* v. *United States*, 11 F. Supp. 322.

This litigation was instituted by the Secretary of Agriculture by an order of October 9, 1929 (R. 182). The decision of the Secretary upon the first hearing, dated July 20, 1931, entitled "Docket No. 298, *Secretary of Agriculture* v. *St. Joseph Stock Yards Company, respondent,* Findings,

Conclusions and Order", is not published in printed form. For convenience, it is reproduced at pages 10-63 of the appendix to this brief. It is hereinafter referred to as the *first decision of the Secretary.* The opinion of the District Court for the Western District of Missouri, St. Joseph Division, granting a permanent injunction against said first decision of the Secretary, is reported in *St. Joseph Stock Yards Co. v. United States,* 58 F. (2d) 290. Thereafter the proceeding was reopened by the Secretary (R. 394). The decision of the Secretary upon the further hearing (the subject of this appeal), entered May 4, 1934 and bearing the caption "Docket No. 298, *Secretary of Agriculture* v. *St. Joseph Stock Yards Company, respondent,* Findings, Conclusions and Order", appears as appendix A to appellant's petition in the District Court (R. 24).

APPENDIX TO THE BRIEF.

We are presenting herewith a separate volume, entitled "Appendix to Appellant's Brief". This appendix is prepared in order that the brief itself may be kept within reasonable limits. Valuation cases of this character involve extensive records and many classes of subject matter. The exhibits necessary upon this appeal have been certified as original exhibits. In addition to the statutes cited, there are, for convenience, included in the appendix the first decision of the Secretary of Agriculture in this proceeding; and portions of other decisions of the Secretary. We have also, for convenience, included in the appendix certain excerpts from the original exhibits. The appendix contains nothing of an argumentative nature and is intended merely as a convenient source of verification for statements of fact which may appear in this brief. It need not be consulted except for that purpose.

THE STATUTES INVOLVED.

The provisions of law which authorize the Secretary to regulate the charges of public stockyards (U. S. C. A. tit. 7, §§210 and 211, appendix to brief, pp. 3-4) are almost word for word transferred from the provisions of the *interstate commerce act* which authorize the Interstate Commerce Commission to prescribe railroad rates. The provisions for court review of the orders of the Commission are in terms made applicable to court review of orders of the Secretary (U. S. C. A. tit. 7, §217, appendix to brief, p. 5). These provisions of the *interstate commerce act* have been construed by this court in a number of cases over a period of approximately forty-five years. In *Tagg Bros. & Moorhead* v. *United States,* 280 U. S. 420, 442, 74 L. ed. 524, 536, after citing certain rules applied by the court to the decisions of the Commission, it is stated:

> "These rules are applicable also to suits arising under the Packers and Stockyards Act."

SPECIFICATION OF ASSIGNED ERRORS INTENDED TO BE URGED.

Appellant intends to urge each of the assigned errors. While they are numerous, in order to afford statement with the particularity required by rule 9, they fall into certain well defined groups as to which the assignments are either as to error in the findings of the District Court or error in failing to make certain findings. The specific assignments of error will be mentioned in each point of the argument.

STATEMENT OF THE CASE.

The Secretary of Agriculture promulgated on May 4, 1934, in "Docket No. 298, *Secretary of Agriculture* v. *St. Joseph Stock Yards Company, respondent,* Findings, Conclusions and Order" (R. 24-131), certain findings concerning the charges made by appellant and entered an order which prescribed substantial reductions in the rates thereafter to be charged by appellant for the services performed in its public stockyards at South St. Joseph, Mo. This decision and order are hereinafter referred to as the decision of the Secretary. The principal reductions prescribed were in the yardage charges; that is to say, the charges made by appellant for its services in connection with the custody, receipt, and holding of live stock pending disposition by the owner.

This proceeding was initiated by the Secretary upon his own motion by an order of October 9, 1929 (R. 182). A hearing under said order was had before an Examiner of the Secretary, December 2 to December 17, 1929, inclusive (R. 182). On July 20, 1931, the Secretary issued therein a document entitled "Docket No. 298, *Secretary of Agriculture* v. *St. Joseph Stock Yards Company, respondent,* Findings, Conclusions and Order". This decision of the Secretary is printed at pages 10-63 of the appendix to this brief and is hereinafter referred to as the *first decision* as distinguished from the decision of the Secretary now in litigation.

On August 7, 1931, appellant filed its petition in the District Court of the United States for the Western District of Missouri, St. Joseph Division, seeking to have said order of July 20, 1931, set aside. Upon final hearing, a permanent injunction against said order was entered. *St. Joseph Stock Yards Co.* v. *United States,* 58 F. (2d) 290.

Following this decision the proceeding was reopened for further hearing by an order of the Secretary dated July 19, 1932 (R. 394). That order provided (R. 396) "that the record heretofore made in this docket, together with all the evidence introduced at said hearing, shall constitute the record before the Secretary of Agriculture in this proceeding"; that is to say, the record upon which the present decision was made included the record upon which was based the decision of the Secretary enjoined in *St. Joseph Stock Yards Co.* v. *United States,* 58 F. (2d) 290. For that reason, all of the evidence at said first hearing, relevant to the points raised by the assignments of error, has been included in the record certified to this court.

A further hearing was had before an Examiner of the Secretary of Agriculture January 10 to February 16, 1933, inclusive. On May 4, 1934, the Secretary entered the decision and order the lawfulness of which is here in issue (R. 24, 131). On May 15, 1934, appellant filed its petition in the District Court for the Western District of Missouri, St. Joseph Division, asking an interlocutory injunction against said order of the Secretary and a permanent injunction after final hearing. The interlocutory injunction was granted conditioned upon the filing of a bond by appellant to secure refund of charges in excess of those prescribed by the Secretary in case the order of the Secretary should be sustained. On May 1, 1935, the District Court filed its decision *St. Joseph Stock Yards Co.* v. *United States,* 11 F. Supp. 322, and therewith its decree, dismissing appellant's bill (R. 141). An order staying said decree was entered May 9, 1935, to permit appellant to apply for and perfect this appeal (R. 142). The appeal was allowed May 24, 1935 (R. 163). Supersedeas was granted (R. 164) upon the filing by appellant of a bond for $200,000 to secure refund of charges in excess of those prescribed by the Secretary, in case the decree

below should be affirmed. On October 28, 1935, this Court noted a finding of probable jurisdiction.

With respect to specific findings of the Secretary in the decision here in issue, the petition in the District Court (R. 1) alleged certain grounds upon which it was contended that the order was void. In general, the reasons so assigned in the petition were that certain fundamental findings of the Secretary were unsupported by the evidence of record; contrary to the evidence of record; contrary to the weight of the evidence; arbitrary; confiscatory; and that the order of the Secretary would deprive appellant of its property without due process of law in violation of the fifth amendment to the Constitution of the United States.

This is the first case to reach this court wherein, under the *Packers and Stockyards Act, 1921,* the Secretary has prescribed the charges to be imposed by a public stockyards company. The order has been attacked as confiscatory and as depriving appellant of certain statutory rights.

Stafford v. *Wallace,* 258 U. S. 495, 66 L. ed. 735, merely declared the *Packers and Stockyards Act, 1921,* to be constitutional, a point not involved in this appeal. It did not deal with the charges made by a stockyards. *Tagg Bros. & Moorhead* v. *United States,* 280 U. S. 420, 74 L. ed. 524, involved the charges prescribed by the Secretary for the services performed by certain commission men, but the powers and duties of a court in a case where confiscation is alleged were not there determined.

The case therefore presents several important questions which it would be well to have decided, not only for the benefit of the stockyards companies which now are or may hereafter be involved in litigation, but also for the benefit of the administrative tribunal.

SUMMARY OF THE ARGUMENT.

I.

The District Court Erred in Declining to Exercise Its Independent Judgment Upon the Law and the Facts as Disclosed by the Record Before the Secretary and the Court in a Case Involving Confiscation.

II.

Summary of Certain Additional Grounds for Reversal of Decree.

III.

The Order Is Void Because the Findings Necessary to Support It Are Not Stated in the Decision of the Secretary; Nor Are Such Findings Supplied in the Decision of the District Court.

IV.

The District Court Erred in Failing to Find That the Order Was Void Because Appellant's Rates and Charges Were Not Unreasonable at the Time of the Hearing.

V.

The District Court Erred in Failing to Find That the Rates Prescribed by the Secretary Would Not Have Produced a Fair or Non-Confiscatory Return Upon the Fair Value of Appellant's Property Used and Useful for Stockyards Purposes During the Period of Six Years Prior to the Hearing Considered by the Secretary in His Decision.

VI.

The Specific Reductions in the Rates and Charges Prescribed by the Secretary Are Arbitrary, Based Upon No Findings in the Decision, Not Supported by Any Evidence of Record, and Are Therefore Void.

VII.

The Decision of the Secretary Was Erroneously Predicated Upon Speculation and Prophecy as to Increased Revenue Which Would Be Obtained by Appellant.

VIII.

It Was Erroneous, and Contrary to the Indisputable Character of the Evidence, to Base Estimates of Increased Revenue for the Future Upon a Study of Six Years, Contrary to the Evidence, Which Demonstrates Gradually Diminishing Receipts Throughout the Period Studied.

IX.

The District Court Erred in Failing to Find That at the Time of the Hearing Appellant Was Applying a Resale Charge Equivalent to That Prescribed by the Secretary Upon All Shipments of Live Stock to Which Such Charge Could Be Applied Under the Secretary's Order; That Therefore Appellant Could Not Obtain from Such Charges as Were Prescribed by the Secretary the Increased Revenue Contemplated in the Decision and Order of the Secretary.

X.

The District Court Erred in Failing to Find That the Order of the Secretary With Respect to Feed Lot Charges Was Void.

XI.

The District Court Erred in Failing to Find That the Value of the Transit House Should Be Included in the Value of Appellant's Property Used and Useful for Stockyards Purposes.

XII.

The District Court Erred in Failing to Find That Appellant's Property, Used and Useful for Stockyards Purposes, Has a Substantial Going Concern Value, in Addition to the Bare Value of the Land and Structures.

XIII.

The District Court Erred in Failing to Find That the Cost of Reproduction New of Appellant's Structures, Less Depreciation, as Determined by the Secretary, Was Not Supported by Any Legal Evidence.

XIV.

The District Court Erred in Failing to Find That the Annual Allowance for a Depreciation Reserve Fixed by the Secretary Was Inadequate, Contrary to the Evidence, Beyond the Statutory Powers of the Secretary, Confiscatory, and Void; and in Failing to Exercise Its Independent Judgment Upon the Law and the Facts.

XV.

The District Court Erred in Failing to Find That the Real and True Value of Appellant's Land in Zone A Exceeded the Value Fixed by the Secretary by Approximately $275,000, and in Failing to Exercise Its Independent Judgment Upon the Facts and Law.

XVI.

The District Court Erred in Its Decision Concerning Appellant's Petition for Rehearing Before the Secretary.

I.

THE DISTRICT COURT ERRED IN DECLINING TO EXERCISE ITS INDEPENDENT JUDGMENT UPON THE LAW AND THE FACTS AS DISCLOSED BY THE RECORD BEFORE THE SECRETARY AND THE COURT IN A CASE INVOLVING CONFISCATION.

Knoxville v. *Knoxville Water Co.*, 212 U. S. 1, 53 L. ed. 371.

Oklahoma Operating Co. v. *Love*, 252 U. S. 331, 64 L. ed. 596.

Ohio Valley Water Co. v. *Ben Avon Borough*, 253 U. S. 287, 64 L. ed. 908.

Prendergast v. *New York Teleph. Co.*, 262 U. S. 43, 67 L. ed. 853.

Bluefield W. W. & Improv. Co. v. *Public Service Com.*, 262 U. S. 679, 67 L. ed. 1176.

Northern P. R. Co. v. *Department of Public Works*, 268 U. S. 39, 69 L. ed. 836.

Lehigh Valley R. Co. v. *Board of Public Utility Comrs.*, 278 U. S. 24, 73 L. ed. 161.

United R. & Electric Co. v. *West*, 280 U. S. 234, 74 L. ed. 390.

Phillips v. *Commissioner of Internal Revenue*, 283 U. S. 589, 75 L. ed. 1289.

Chicago, R. I. & P. R. Co. v. *United States*, 284 U. S. 80, 76 L. ed. 177.

Crowell v. *Benson*, 285 U. S. 22, 76 L. ed. 598.

Norwegian Nitrogen Prod. Co. v. *United States*, 288 U. S. 294, 77 L. ed. 796.

Lindheimer v. *Illinois Bell Teleph. Co.*, 292 U. S. 151, 78 L. ed. 1182.

Dayton P. & L. Co. v. *Public Utilities Commission*, 292 U. S. 290, 78 L. ed. 1267.

Columbus Gas & Fuel Co. v. *Public Util. Com.*, 292 U. S. 398, 78 L. ed. 1327.

West Ohio Gas Co. v. *Public Utilities Com.*, 294 U. S. 79, 79 L. ed. 773.

United States v. *Chicago, M., St. P. & P. R. Co.*, 294 U. S. 499, 79 L. ed. 1023.

Atchison, T. & S. F. R. Co. v. *United States*, 295 U. S. 193, 79 L. ed. 1382.

West v. *Chesapeake & P. Teleph. Co.*, 295 U. S. 662, 79 L. ed. 1640.

The error here alleged is covered by no. 2 of our statement of points to be relied upon and by assignments of error nos. 4 and 5.

The question of confiscation is squarely in issue. Appellant alleged in its petition that the order was confiscatory, and thereupon contended that it was entitled to the independent judgment of the District Court upon the law and the facts. Substantially each paragraph of the petition in the District Court (R. 1), except the formal portions, alleges that the decision and order, if permitted to become effective, will result in confiscation of appellant's property in the constitutional sense; that is to say, because the prescribed rates would not permit a fair return upon the fair value of the property. It is apparent from an examination of the petition in the District Court that appellant alleged, as it still contends, that the order was void, amongst other reasons, because—

1. The prescribed rates would have produced a confiscatory return at the time of the hearing and prior thereto, even upon the values determined by the Secretary.

2. The value of appellant's land, as determined by the Secretary in the present decision, is far below its real and true value.

3. The elimination of the Transit House from the property upon which appellant may earn a fair return is *pro tanto* confiscatory.

4. The depreciated value placed by the Secretary upon appellant's structures found by him to be used and useful is confiscatory.

5. The denial of going concern value as a part of the total value of appellant's property is confiscatory.

6. The amount allowed annually for a depreciation reserve, to be included in operating expenses, is inadequate and confiscatory.

With respect to each allegation of confiscation in the petition, there was complete evidence before the Secretary on behalf of the appellant, as is shown by the printed record in this court of the oral evidence, which includes all the evidence upon each point as to which error is assigned.

In the District Court, appellant urged that it was entitled to the *independent judgment of the District Court upon the law and the facts.* By that contention it was meant that, in a case of this kind where confiscation is seriously urged, and there is conflicting evidence, the District Court has the power, and the corresponding duty, to weigh the evidence presented to it (which in this case was all of the evidence of both parties taken at the hearings before the Secretary) and to decide the cause according to the weight of the evidence and as justice may require.

The validity of this contention was denied by the District Court. The point is discussed at pages 326-328 (11 F. Supp.). The District Court decided, in substance, that its powers and duties extend only to requiring it to examine the record so far as may be necessary *to determine whether there was some substantial evidence to support the conclusions and order of the Secretary.* We quote here a few paragraphs from the decision of the District Court, in order to set forth fairly the conclusion reached by it.

"2. Confiscation.

(6) *Scope of Review.*—At the very threshold is the preliminary question: What is the scope of this review? Is the petitioner entitled to the independent judgment of this court as to the law and the facts upon the record made before the Secretary or is this court bound to accept the findings of fact made by the Secretary if they are supported by substantial evidence? * * *

"The latest decision of this question was by a three-judge court for the District of Nebraska. *Union Stock Yards Co.* v. *United States* (D. C.), 9 F. Supp. 864. The case was similar to this. The principal issue was that of confiscation. In the opinion by Circuit Judge Woodrough (Circuit Judge Gardner and District Judge Munger concurring) the court said (9 F. Supp. 864, loc. cit. 873): 'Our judicial function does not go beyond the decision of the constitutional question whether the rates as fixed are confiscatory. His (the Secretary's) findings of fact supported by substantial testimony are not subject to review.' * * *

"When it is said that an independent judgment must be reached by the court, it is meant that the court's findings must be determined by the weight of the evidence and not by a consideration as to whether the findings of the administrative agency are supported by substantial evidence or are arbitrary. A finding may well be supported by substantial evidence and still be against the weight of the evidence. * * * (Footnote, p. 327).

"Findings of fact made by the Secretary of Agriculture in a proceeding under the Packers and Stockyards Act are made conclusive by statute. * * *

"The contention is that the phrase 'judicial power' includes the exclusive power finally to decide all issues of fact in a case where a constitutional right is claimed to have been violated. But it is not contended that it includes that exclusive power where a constitutional right is not claimed to have been violated. A case of the latter character may be quite as important to the litigant as a case of the former character and may involve as much. No good reason can be given for this distinction. 'In respect to the question * * * of the finality to be accorded administrative findings

> of fact * * * I see no reason for making special exception as to issues of constitutional right, * * * said Mr. Justice Brandeis (Mr. Justice Stone and Mr. Justice Roberts concurring) in his dissenting opinion in *Crowell* v. *Benson*, 285 U. S. 22, 80, 52 S. Ct. 285, 303, 76 L. ed. 598.
>
> "Upon this phase of the case our view coincides with that expressed by the learned justice of the Supreme Court as thus set out and with that of Circuit Judge Woodrough in *Union Stock Yards* v. *United States, supra.*"

The decision of the District Court is fair in this respect, that, having determined this point adversely to appellant, it is made clear throughout the remainder of the opinion, in dealing with issues involving confiscation, that the District Court was going no further than to ascertain whether there was some evidence to sustain the Secretary; that the District Court, far from giving weight to or considering the evidence of appellant, *did not even weigh the evidence of the Secretary in order to decide whether the Secretary's evidence sustained the conclusions stated,* much less decide between the conflicting evidence of appellant and the Secretary. It will be noted by reference to page 338, paragraph 2 of the decision, (11 Fed. Supp.) that *the District Court did not even decide the law question raised by appellant as to whether, where the Secretary finds unjust discrimination, he must afford appellant an alternative method of removal.*

Appellant asserts that if, instead of the very limited review afforded by the District Court, appellant had had the benefit of the court's independent judgment upon the law and the facts, as disclosed in the record before the court (which was the entire record before the Secretary), the decree of the court, instead of dismissing appellant's petition, must necessarily have enjoined the Secretary's order; and that, in denying appellant the independent judgment of the court upon the law and the facts,

the court deprived appellant of a constitutional right guaranteed by the fifth amendment, as declared by this court in many decisions. It is to be regretted that, because of this action by the District Court, a much more complete discussion of the evidence is necessary in this court than would otherwise be required.

Importance of the question. It is important that this point should be decided on this appeal for two reasons: (1) there is a division of opinion upon this point in the decisions of the district courts; and (2) similar litigation is arising from time to time.

(1) *Conflict of decisions in district courts.* In *Denver Union Stock Yard Co.* v. *United States,* 57 F. (2d) 735, by a three-judge court of the District of Colorado, this point was decided (see page 739), and the court held that it was within its power and duty to weigh the evidence and decide accordingly. The order of the Secretary was set aside. In *American Commission Co.* v. *United States,* 11 F. Supp. 965, the same conclusion was reached by the same court, but the bill was dismissed upon the ground that it did not make out a case of confiscation.

In the first decision in this proceeding, *St. Joseph Stock Yards Co:* v. *United States,* 58 F. (2d) 290, (western district of Missouri, St. Joseph division), a majority of the court was of opinion that the court "must for itself determine from the weight of the evidence in the case the issues of fact which may be involved in it." (See footnote page 295.) In the second decision in this proceeding, which is the subject of this appeal, the three-judge court for the *same district* and *same division* reversed the decision just cited.

In *Union Stock Yards Co. of Omaha* v. *United States,* 9 F. Supp. 864, at page 875, the court (district of Nebraska,

Omaha division) held that the plaintiff was *not* entitled to the independent judgment of the court upon the law and the facts. In said decision the District Court at Omaha cited in support of its conclusion upon this point certain decisions which had been made under the *interstate commerce act.* None of those decisions involved confiscation. To establish this point, we refer briefly to the cases cited by the District Court in the *Omaha case* in order to show that they are not authority for the proposition stated in that decision.

Florida v. *United States,* 292 U. S. 1, 78 L. ed. 1077, involved an order which *increased* the carriers' revenues; the second case, *Merchants Warehouse Co.* v. *United States,* 283 U. S. 501, 75 L. ed. 1227, involved an attack by a *shipper* upon an order finding a railroad guilty of discrimination; the third case, *Assigned Car Cases,* 274 U. S. 564, 71 L. ed. 1204, involved an order requiring carriers to remove discrimination in the assignment of coal cars to mines; the fourth case, *United States* v. *Louisville & N. R. Co.,* 235 U. S. 314, 59 L. ed. 245, upheld an order of the Interstate Commerce Commission, which in effect *increased* the carriers' rates; the fifth case, *Interstate Commerce Com.* v. *Louisville & N. R. Co.,* 227 U. S. 88, 57 L. ed. 431, involved an order of the Interstate Commerce Commission reducing a limited number of specific rates between certain points, but there was no allegation or proof of confiscation; the sixth case, *Skinner & Eddy Corp.* v. *United States,* 249 U. S. 557, 63 L. ed. 772, involved the validity of an order of the Commission authorizing an *increase* in railroad rates; the seventh case, *Seaboard Air Line Railway Co.* v. *United States,* 254 U. S. 57, 65 L. ed. 129, involved the validity of an order of the Commission requiring railroads to eliminate discrimination in switching absorptions; the eighth case, *New England Divisions Case,* 261 U. S. 184, 67 L. ed. 605, involved an order of the Commission changing divi-

sions of joint through rates between certain carriers and did not involve confiscation; the ninth case, *Western Paper Makers' Chemical Co.* v. *United States,* 271 U. S. 268, 70 L. ed. 941, involved an order of the Commission prescribing rates on rosin between certain points, but the carriers against whom the order ran were not parties to the action.

None of these cases involved the issue of confiscation in the sense of allegation and proof that a net income was fixed below that permitted to the administrative tribunal under the Constitution; or that values were fixed which were substantially below the real and true values.

(2) *Similar litigation is arising.* This is the first case to come before this court under the *Packers and Stockyards Act, 1921,* in which the Secretary has prescribed reduced charges to be applied by a public stockyards and confiscation is alleged. A substantial number of such cases are now in progress of investigation, amongst which the following may be mentioned: docket No. 305, *Secretary of Agriculture* v. *Kansas City Stock Yards Co.,* Kansas City, Mo.; docket No. 306, *Secretary of Agriculture* v. *St. Louis National Stock Yards,* National Stock Yards, Ill.; docket No. 450, *Secretary of Agriculture* v. *Denver Union Stock Yard Co.,* Denver, Colo.; docket No. 472, *Secretary of Agriculture* v. *Union Stock Yard & Transit Co.,* Chicago, Ill. (See "The Monthly Record", issued by the Packers and Stockyards Division, Bureau of Animal Industry, United States Department of Agriculture, Vol. 12, No. 9.)

It is, therefore, of public importance that the correct rule be determined by this court for the guidance of the Governmental authorities as well as the public stockyards. So long as there is confusion upon this point it is difficult for counsel for the parties to know upon what theory the cases should be tried either before the Secretary or in the district courts.

AN UNBROKEN LINE OF DECISIONS OF THIS COURT INDICATES THE ERROR OF THE DISTRICT COURT.

The cases cited at the commencement of this chapter are all cases in which this Court exercised its independent judgment upon the law and the facts or stated the doctrine for which appellant here contends. For convenience, we here summarize those cases briefly.

In *Knoxville* v. *Knoxville Water Co.*, 212 U. S. 1, 8, 53 L. ed. 371, this Court said:

> "The constitutional invalidity should be manifest, and where that invalidity rests upon disputed questions of fact, the invalidating facts must be proved to the satisfaction of the court. * * * The power is best safeguarded against abuse by preserving to this court complete freedom in dealing with the facts of each case."

In *Oklahoma Operating Co.* v. *Love*, 252 U. S. 331, 335, 64 L. ed. 596, this Court said:

> "The order of the Commission prohibiting the company from charging, without its permission, rates higher than those prevailing in 1913, in effect prescribed maximum rates for the service. It was, therefore, a legislative order; and under the 14th Amendment plaintiff was entitled to an opportunity for a review in the courts of its contention that the rates were not compensatory."

In *Ohio Valley Water Co.* v. *Ben Avon Borough*, 253 U. S. 287, 289, 64 L. ed. 908, this Court said:

> "The order here involved prescribed a complete schedule of maximum future rates and was legislative in character. * * * In all such cases, if the owner claims confiscation of his property will result, the state must provide a fair opportunity for submitting that issue to a judicial tribunal for determination upon its own independent judgment as to both law and facts; otherwise the order is void because in conflict with the due process clause, 14th Amendment."

The following statement is found in *Prendergast* v. *New York Teleph. Co.*, 262 U. S. 43, 50, 67 L. ed. 853:

> "The sole issue presented was whether or not the orders were confiscatory; which was to be determined by the court upon the evidence submitted to it."

In *Bluefield W. W. & Improv. Co.* v. *Public Service Com.*, 262 U. S. 679, 683, 67 L. ed. 1176, the Court said:

> "If, as alleged, the prescribed rates are confiscatory, the order is void. Plaintiff in error is entitled to bring the case here on writ of error and to have that question decided by this court. The motion to dismiss will be denied."

In *Northern P. R. Co.* v. *Department of Public Works*, 268 U. S. 39, 69 L. ed. 836, this Court reviewed the evidence and expressed its own judgment thereon.

This rule as to the scope of the court review was again stated in *Lehigh Valley R. Co.* v. *Board of Public Utility Comrs.*, 278 U. S. 24, 36, 73 L. ed. 161, as follows:

> "This court held on error that because the plaintiff in error had not had proper opportunity for an adequate independent judicial hearing as to confiscation on the law and the facts, the challenged order was invalid, and that the judgment of the supreme court of the state must be reversed."

This rule was again stated by this Court in *United R. & Electric Co.* v. *West*, 280 U. S. 234, 251, 74 L. ed. 390:

> "The court in the discharge of its constitutional duty on the issue of confiscation must determine the amount to the best of its ability in the exercise of a fair enlightened and 'independent judgment as to both law and facts.'"

In *Phillips* v. *Commissioner of Internal Revenue*, 283 U. S. 589, 600, 75 L. ed. 1289, this Court said:

> "Save as there may be an exception for issues presenting claims of constitutional right, such administrative findings on issues of fact are accepted by the court as conclusive if the evidence was legally sufficient to sustain them and there was no irregularity in the proceedings."

In *Chicago, R. I. & P. R. Co.* v. *United States*, 284 U. S. 80, 76 L. ed. 177, this Court substituted its own judgment for that of the Commission upon a question involving confiscation and stated "an infringement upon the right of ownership constitutes a violation of the due process clause of the 5th Amendment."

In *Crowell* v. *Benson*, 285 U. S. 22, 57, 76 L. ed. 598, this court said:

> "The recognition of the utility and convenience of administrative agencies for the investigation and finding of facts within their proper province, and the support of their authorized action, does not require the conclusion that there is no limitation of their use, and that the Congress could completely oust the courts of all determinations of fact by vesting the authority to make them with finality in its own instrumentalities or in the Executive Department. That would be to sap the judicial power as it exists under the Federal Constitution, and to establish a government of a bureaucratic character alien to our system, *wherever fundamental rights depend, as not infrequently they do depend, upon the facts, and finality as to facts becomes in effect finality in law.*" (Emphasis ours).

In *Norwegian Nitrogen Prod. Co.* v. *United States*, 288 U. S. 294, 318, 77 L. ed. 796, this Court said:

> "It is very different, however, when orders are directed against public service corporations limiting their powers in the transaction of their business. They may be challenged in the courts if the effect is to reduce the charges to the point of confiscation."

In *Lindheimer* v. *Illinois Bell Teleph. Co.*, 292 U. S. 151, 78 L. ed. 1182, this Court made findings of fact of its own which differed from those made by the state commission and from those made by the United States District Court.

In *Dayton P. & L. Co.* v. *Public Utilities Commission*, 292 U. S. 290, 78 L. ed. 1267, although this Court affirmed the order of the Ohio Public Utilities Commission, it examined the evidence and made its own findings.

In *Columbus Gas & Fuel Co.* v. *Public Util. Com.*, 292 U. S. 398, 78 L. ed. 1327, this Court made certain findings of fact of its own and reversed the decision of the Ohio Commission upon the ground that it had made an inadequate provision in operating expenses for replenishing the wasting assets of the company.

In *West Ohio Gas Co.* v. *Public Utilities Com.*, 294 U. S. 79, 79 L. ed. 773, a case where confiscation was alleged, this Court substituted its judgment for that of the commission and set aside the order largely because the reduced rates were based upon prophecy rather than experience.

In *United States* v. *Chicago, M., St. P. & P. R. Co.*, 294 U. S. 499, 79 L. ed. 1023, this Court expressed its independent judgment upon the law and the facts and, for reasons there stated, set aside the order of the Interstate Commerce Commission.

In *Atchison, T. & S. F. R. Co.* v. *United States*, 295 U. S. 193, 79 L. ed. 1382, this Court undoubtedly exercised its independent judgment upon both the law and the facts in the opinion in which it set aside the order of the Interstate Commerce Commission and reversed the decision of the District Court.

In *West* v. *Chesapeake & P. Teleph. Co.*, 295 U. S. 662, 79 L. ed. 1640, this Court passed *sub silentio* the question of its right to exercise its independent judgment upon the law and the facts, but in the decision below (*Chesapeake & Potomac Telephone Co.* v. *West*, 7 F. Supp. 214) that was one of the contested points. Upon that point, the District Court had said (at page 230):

> "Counsel for the Commission contend that the court may not disturb the Commision's valuation unless the Company has proved *beyond a reasonable doubt* 'that the Commission has been wrong to such an extreme degree that in the light of all present circumstances, no reasonable body of men could have reached such a

> conclusion.' But the law is otherwise. On the issue of confiscation the Court must exercise its own independent judgment of law and fact."

The decision of this Court affirmed the decree of the District Court.

It cannot be successfully argued that *Tagg Bros. & Moorhead* v. *United States,* 280 U. S. 420, 74 L. ed. 524, constitutes any exception to this rule. The point was passed in that case because it was believed that confiscation had not been established, the Court saying:

> "The validity of an order of the Secretary, like that of an order of the Interstate Commerce Commission, must be determined upon the record of the proceedings before him—save as there may be an exception of issues presenting claims of constitutional right, a matter which need not be considered or decided now."

Atlanta, B. & C. R. Co. v. *United States,* ..... U. S. ....., 80 L. ed. (Adv. Ops.) 25, decided November 11, 1935, did not involve the issue of confiscation.

There has been an unbroken line of decisions since the *Knoxville case* in 1909 down to the *West case* at the end of the last term, holding that, under circumstances such as are here disclosed, appellant is entitled to the independent judgment of the court upon the law and the facts in so far as issues of confiscation are involved. The District Court made it plain that it was denying appellant such a review in this case. It is respectfully submitted that in so doing it erred and, because of this error, if no other ground existed, it would be necessary to reverse the decision of the District Court.

II.

SUMMARY OF CERTAIN ADDITIONAL GROUNDS FOR REVERSAL OF DECREE.

Aside from the error alleged because of the failure of the District Court to exercise its independent judgment upon the law and the facts, it is the contention of appellant that, even confining the court review to the narrowest limits that have been stated where confiscation is *not* an issue, and using solely facts as to income, expenses, value of land and structures, etc., determined by the Secretary or fixed by his witnesses, the decision and order are void.

The rules here alleged to have been violated are drawn from the decisions cited below.

Interstate Commerce Com. v. *Northern P. R. Co.*, 216 U. S. 538, 54 L. ed. 608.

Interstate Commerce Com. v. *Louisville & N. R. Co.*, 227 U. S. 88, 57 L. ed. 431.

Florida E. C. R. Co. v. *United States*, 234 U. S. 167, 58 L. ed. 1267.

Great Northern R. Co. v. *Minnesota*, 238 U. S. 340, 59 L. ed. 1337.

Missouri Ex Rel. S. W. Bell T. Co. v. *Public Serv. Com.*, 262 U. S. 276, 67 L. ed. 981.

Board of Public Utility Comrs. v. *New York Teleph. Co.*, 271 U. S. 23, 70 L. ed. 808.

McCardle v. *Indianapolis Water Co.*, 272 U. S. 400, 71 L. ed. 316.

Tagg Bros. & Moorhead v. *United States*, 280 U. S. 420, 74 L. ed. 524.

Beaumont, S. L. & W. R. Co. v. *United States*, 282 U. S. 74, 75 L. ed. 221.

Florida v. *United States*, 282 U. S. 194, 75 L. ed. 291.

Southern R. Co. v. *Virginia,* 290 U. S. 190, 78 L. ed. 260.

West Ohio Gas Co. v. *Public Utilities Com.,* 294 U. S. 79, 79 L. ed. 773.

United States v. *Baltimore & O. R. Co.,* 293 U. S. 454, 79 L. ed. 587.

United States v. *Chicago, M., St. P. & P. R. Co.,* 294 U. S. 499, 79 L. ed. 1023.

Atchison, T. & S. F. R. Co. v. *United States,* 295 U. S. 193, 79 L. ed. 1382.

Schechter v. *United States,* 295 U. S. 495, 79 L. ed. 1570.

A.

A PREREQUISITE TO THE REDUCTION OF RATES IS EVIDENCE WHICH WILL SUPPORT A FINDING THAT PRESENT RATES ARE UNREASONABLE.

"The authority of the Commission to establish through routes and joint rates is conditioned by the proviso that 'no reasonable or satisfactory through route exists.' • • • We are of opinion, then, that the Commission had no power to make the order *if a reasonable and satisfactory through route already existed,* and that the existence of such a route may be inquired into by the courts. • • • The condition in the statute is not to be trifled away." *Interstate Commerce Com.* v. *Northern P. R. Co.,* 216 U. S. 538, 543, 544, 545, 54 L. ed. 608, 609. (Emphasis ours.)

"Under the statute the carrier retains the primary right to make rates, but if, after hearing, they are shown to be unreasonable, the Commission may set them aside and require the substitution of just for unjust charges. The Commission's right to act depends upon the existence of this fact, *and if there was no evidence to show that the rates were unreasonable there was no jurisdiction to make the order. Interstate Commerce Commission* v. *Northern P. R. Co.* 216 U. S. 544, 54 L. ed. 609, 30 Sup. Ct. Rep. 417. • • • the legal effect of evidence is a question of law. A finding without evidence is beyond the power of the Commission. An order based thereon is contrary to law, and

must, in the language of the statute, be 'set aside by a court of competent jurisdiction.' 36 Stat. at L. 551, chap. 309." *Interstate Commerce Com.* v. *Louisville & N. R. Co.*, 227 U. S. 88, 92, 57 L. ed. 431, 433, 434. (Emphasis ours.)

"The Commission may not change an existing division unless it finds that division unjust or unreasonable." *Beaumont, S. L. & W. R. Co.* v. *United States*, 282 U. S. 74, 82, 75 L. ed. 221, 228.

B.

AN ORDER MADE WITHOUT EVIDENCE, OR UPON EVIDENCE WHICH CLEARLY DOES NOT SUPPORT IT, IS VOID.

"While a finding of fact made by the Commission concerning a matter within the scope of the authority delegated to it is binding, and may not be re-examined in the courts, it is undoubted that where it is contended that an order whose enforcement is resisted was rendered *without any evidence whatever to support it*, the consideration of such a question involves not an issue of fact, but one of law, which it is the duty of the courts to examine and decide. *Interstate Commerce Commission* v. *Louisville & N. R. Co.* 227 U. S. 88, 91, 92, 57 L. ed. 431, 433, 434, 33 Sup. Ct. Rep. 185, and cases cited." *Florida E. C. R. Co.* v. *United States*, 234 U. S. 167, 185, 58 L. ed. 1267, 1271, 1272. (Emphasis ours.)

"The facts being established, the question then presented is whether, as matter of law, they are adequate to support a finding of requisite public necessity,—*the mere declaration of a commission is not conclusive.*" *Great Northern R. Co.* v. *Minnesota*, 238 U. S. 340, 345, 59 L. ed. 1337, 1339. (Emphasis ours.)

"It has been settled in cases arising under the Interstate Commerce Act that if an order rests upon an erroneous rule of law (*Interstate Commerce Commission* v. *Diffenbaugh*, 222 U. S. 42, 56 L. ed. 83, 32 Sup. Ct. Rep. 22), *or is based upon a finding made without evidence* (*Chicago Junction case* (*Baltimore & O. R. Co.* v. *United States*) 264 U. S. 258, 263, 68 L. ed. 667, 673, 44 Sup. Ct. Rep. 317), *or upon evidence which clearly does not support it* (*Interstate Commerce Commission* v. *Union P. R. Co.* 222 U. S. 541, 547, 56 L. ed. 308, 311, 32 Sup. Ct. Rep. 108; *New*

England Divisions Case (*Akron, C. & Y. R. Co.* v. *United States*) 261 U. S. 184, 203, 67 L. ed. 605, 615, 43 Sup. Ct. Rep. 270; *Colorado* v. *United States*, 271 U. S. 153, 166, 70 L. ed. 878, 884, 46 Sup. Ct. Rep. 452), the order must be set aside. These rules are applicable also to suits arising under the Packers and Stockyards Act." *Tagg Bros. & Moorhead* v. *United States*, 280 U. S. 420, 442, 74 L. ed. 524, 536. (Emphasis ours.)

"There is an obvious difference between legislative determination and the finding of an administrative official *not supported by evidence.*" *Southern R. Co.* v. *Virginia*, 290 U. S. 190, 197, 78 L. ed. 260, 266. (Emphasis ours.)

"That administrative agency, in dealing with particular cases, is required to act upon notice and hearing, and *its orders must be supported by findings of fact which in turn are sustained by evidence.*" *Schechter* v. *United States*, 295 U. S. 495, 539, 79 L. ed. 1570, 1585. (Emphasis ours.)

C.

THE PRESCRIBED RATES MUST BE REASONABLE, AND THE CONDEMNED RATES UNREASONABLE, AT THE TIME OF THE HEARING.

"There must be a fair return upon the reasonable value of the property *at the time it is being used for the public.*" *Missouri Ex Rel. S. W. Bell T. Co.* v. *Public Serv. Com.*, 262 U. S. 276, 287, 67 L. ed. 981, 984, 985. (Emphasis ours.)

"The just compensation safeguarded to the utility by the 14th Amendment is a reasonable return on the value of the property used *at the time that it is being used for the public service.*" *Board of Public Utility Comrs.* v. *New York Teleph. Co.*, 271 U. S. 23, 31, 70 L. ed. 808, 812. (Emphasis ours.)

"It must be determined whether the rates complained of are yielding and will yield, over and above the amounts required to pay taxes and proper operating charges, a sum sufficient to constitute just compensation for the use of the property employed to furnish the service; that is, *a reasonable rate of return on the value of the property at the time of the investigation and for a reasonable time in the immediate future.*" *McCardle* v. *Indianapolis Water Co.*, 272 U. S. 400, 408, 409, 71 L. ed. 316, 324. (Emphasis ours.)

D.

THE DECISION IS VOID IF IT DOES NOT CONTAIN BASIC OR ESSENTIAL FINDINGS WHICH SUPPORT THE ORDER.

"The Commission's failure specifically to report the facts and give the reasons on which it concluded that under the circumstances the use of the average or group basis is justified leaves the parties in doubt as to a matter essential to the case and imposes unnecessary work upon the courts called upon to consider the validity of the order. Complete statements by the Commission showing the grounds upon which its determinations rest are quite as necessary as are opinions of lower courts setting forth the reasons on which they base their decisions in cases analogous to this. *Wichita R. & Light Co.* v. *Public Utilities Commission,* 260 U. S. 48, 58, 67 L. ed. 124, 130, 43 S. Ct. 51. And we have recently emphasized the duty of such courts fully to state the grounds upon which they act." *Beaumont S. L. & W. R. Co.* v. *United States,* 282 U. S. 74, 86, 75 L. ed. 221, 230. (Emphasis ours.)

"The question is not merely one of the absence of elaboration or of a suitably complete statement of the grounds of the Commission's determination, to the importance of which this court has recently adverted (*Beaumont, S. L. & W. R. Co.* v. *United States,* decided November 24, 1930, 282 U. S. 74, ante, 221, 51 S. Ct. 1), *but of the lack of the basic or essential findings required to support the Commission's order. In the absence of such findings, we are not called upon to examine the evidence in order to resolve opposing contentions as to what it shows or to spell out and state such conclusions of fact as it may permit.* The Commission is the fact-finding body and the court examines the evidence not to make findings for the Commission but to ascertain whether its findings are properly supported." *Florida* v. *United States,* 282 U. S. 194, 215, 75 L. ed. 291, 304. (Emphasis ours.)

"It is true that formal and precise findings are not required, under § 14 (1) of the Interstate Commerce Act, which declares that the report 'shall state the conclusions of the Commission together with its decision.' • • • That provision relieves the Commission from making comprehensive findings of fact similar to those required by Equity Rule 70½. *But § 14 (1) does not remove the necessity of*

making, where orders are subject to judicial review, quasi-jurisdictional findings essential to their constitutional or statutory validity.'' United States v. *Baltimore & O. R. Co.,* 293 U. S. 454, 465, 79 L. ed. 587, 595. (Emphasis ours.)

"The difficulty is that it (Interstate Commerce Commission) has not said so with the simplicity and clearness through which a halting impression ripens into reasonable certitude. *In the end we are left to spell out, to argue, to choose between conflicting inferences. Something more precise is requisite in the quasi-jurisdictional findings of an administrative agency.'' United States* v. *Chicago, M., St. P. & P. R. Co.,* 294 U. S. 499, 510, 511, 79 L. ed. 1023, 1032. (Emphasis ours.)

"In the absence of a finding of essential basic facts, the order cannot be sustained. Florida v. *United States,* 282 U. S. 194, 215, 75 L. ed. 291, 304, 51 S. Ct. 119. Recently this court has repelled the suggestion that lack of express finding by an administrative agency may be supplied by implication.'' *Atchison, T. & S. F. R. Co.* v. *United States,* 295 U. S. 193, 202, 79 L. ed. 1382, 1390. (Emphasis ours.)

E.

THE ORDER IS VOID IF BASED UPON MERE PROPHECY.

"But prophecy, however honest, is generally a poor substitute for experience. * * * We have said of an attempt by a utility to give prophecy the first place and experience the second that 'elaborate calculations which are at war with realities are of no avail.' * * * We say the same of a like attempt by officers of government prescribing rates to be effective in years when experience has spoken. A forecast gives us one rate. A survey gives another. *To prefer the forecast to the survey is an arbitrary judgment.'' West Ohio Gas Co.* v. *Public Utilities Com.,* 294 U. S. 79, 82, 79 L. ed. 773, 776. (Emphasis ours.)

III.

THE ORDER IS VOID BECAUSE THE FINDINGS NECESSARY TO SUPPORT IT ARE NOT STATED IN THE DECISION OF THE SECRETARY; NOR ARE SUCH FINDINGS SUPPLIED IN THE DECISION OF THE DISTRICT COURT.

This contention is covered by point 17 of our statement of points to be relied upon (R. 941) and by the assignments of error therein referred to. In presenting this contention, we are relying upon the rule announced by this Court in the cases cited on pp. 27-28 of this brief.

All of these cases arose upon appeals under the *interstate commerce act*. That act is, by § 217, U. S. C. A. tit. 7, made applicable to review of the decisions of the Secretary of Agriculture. Consequently, the same rule must apply in this case.

We first contend that the order is void because the decision does not contain the "basic or essential findings" required to support it. Neither does the opinion of the District Court, although each group of facts here stated was presented to the District Court in substantially the same manner, and it was urged to make appropriate findings thereon.

BASIS FOR THE FINDING OF UNREASONABLENESS.

In order that the Court may appreciate the force of this contention, it is necessary first to state the basis upon which the reduction in rates was ordered by the Secretary.

1. No effort was made by the Secretary or the Government witnesses to obtain the costs of *specific* services, such as yarding cattle, yarding hogs, yarding sheep, or the difference between the cost of yarding live stock received by rail and by truck, the cost of feeding live stock, of loading

and unloading railroad cars, of maintenance of the exchange Building, etc. This was so stated by the Government auditor in the portion of his testimony quoted at pp. 62, 63 of this brief.

2. The theory upon which the Secretary acted in declaring that appellant's rates are unreasonable is stated as follows in paragraph 40 of the decision (R. 45):

> "A test of the reasonableness of the rates now being charged by respondent is whether the revenue produced by them is substantially in excess of the amount necessary to pay the reasonable cost of rendering the services for which those rates are charged, including in such costs a fair return upon the fair value of respondent's property used and useful in the rendition of such services. A test of the reasonableness of rates to be prescribed, if those now being charged by respondent be found to be unreasonable, is whether the revenue reasonably to be anticipated from them are sufficient to pay the aforesaid reasonable costs of rendering the services. To the end that these facts may be determined, it is necessary to ascertain from the evidence (1) the property used and useful in the rendition of the services; (2) the fair value of that property; (3) the fair return on that fair value; (4) respondent's reasonable operating expenses; and (5) the volume of business reasonably to be anticipated for respondent in the immediate future."

For the purpose of this point, we need not discuss the propriety of the theory stated by the Secretary. Suffice it to say that it is the theory, and the only one, upon which the Secretary acted.

3. The only statements contained in the Secretary's decision indicating how he reached the conclusions carried into the order are found in paragraphs 168 and 206 of his decision and read as follows:

> "The rates hereafter prescribed in this order are based upon detailed studies of the financial operations of the business of the respondent during this six-year period, and upon a consideration of the history of the

company and other facts with respect to it extending over a much longer period." (Par. 168, Secretary's decision, R. 115.)

"An application of the rates now being charged by the respondent to the volume of business hereinbefore discussed produces revenues in excess of those necessary to pay the reasonable expenses incurred in handling that business and a fair return upon the fair value of respondent's property." (Par. 206, Secretary's decision, R. 128.)

In the foregoing quotation from paragraph 206, the "volume of business *hereinbefore discussed*" refers *not to the volume of business being done by appellant at the time of the hearing* but to the much larger volume predicted by the Secretary for the future in paragraphs 201, 203, 204, and 208 of the decision (R. 126, 127, 129). For a comparison of those estimates with the actual business at the time of the hearing, see pp. 71, 72 of this brief.

Inasmuch then as the test adopted by the Secretary, and the only test, is whether the rates charged by appellant produced in totality a sum in excess of 7 per cent upon the value determined by the Secretary, after deduction of reasonable operating expenses, we point out the complete lack of specific findings to support the conclusions stated in paragraph 206 of the decision. Recalling that the only test is whether the revenue from stockyards services exceeds the cost of operation, plus a fair return:

(a) *The decision contains no finding which sets forth appellant's gross operating income from stockyards services in 1932, the last year covered by the record; no finding of appellant's net operating revenue for that year; no finding as to what, if any, return upon the fair value of appellant's property resulted from the rates maintained by appellant, or would have resulted from the rates prescribed by the Secretary.* This is a "basic or essential finding" necessary to support the conclusion. The order

"must be supported by findings of fact which, in turn, are sustained by evidence."

The Secretary finds that the fair return to appellant should be $192,010 per annum. For aught that appears in any of his findings, appellant's income in 1932 might have been $90,010 or $290,010. If the former, it plainly precluded a reduction of charges; if the latter, under the theory followed by the Secretary, the charges might have been reduced. *No findings of fact of this nature are made.* As we demonstrate later from the evidence, the prescribed rates for 1932 would have produced a net income, after operating expenses, of $81,026 or 2.95 per cent upon the fair value of $2,743,000 determined by the Secretary.

But the Secretary says (par. 168 of decision, R. 115), that the prescribed rates are based upon "detailed studies of the financial operations of the business of the respondent during the six-year period, and upon a consideration of the history of the company and other facts with respect to it extending over a much longer period." What these financial operations during the six-year period may have been and what the other facts extending over a much longer period may have been are not included in any finding in this decision. Consequently, we call attention to the following as the second group of essential of basic facts which are not contained in any finding.

(b) *The Secretary's decision contains no finding as to appellant's gross income from stockyards services in the period 1927-1932; it contains no finding as to appellant's net operating revenue from stockyards services, for the same period; no finding as to what, if any, return was made by appellant upon the fair value of its property during the period 1927-1932; no finding as to what return, if any, would have been made by appellant upon the fair value of the property as determined by the Secretary in the present*

decision, or upon the higher value determined in the first decision (appendix to brief, pp. 10, 50) *if the rates prescribed by the Secretary had been in effect.*

Such a finding upon the part of the Secretary was indeed called for in view of the decision in *St. Joseph Stock Yards Co.* v. *United States,* 58 F. (2d) 290, wherein it was specifically found that the rates prescribed by the Secretary would have produced a confiscatory return in 1930 and the first half of 1931. In the absence of such a finding by the Secretary, the District Court should have made the findings required by the evidence. For aught that appears in the Secretary's decision or that of the District Court, appellant's net operating income during the six years prior to the hearing might have produced a return of 7 per cent, of 1 per cent, or of 15 per cent. No finding in respect thereto is contained in the decision of the Secretary or the District Court. Yet, upon the Secretary's theory of the case, no reduction could have been made unless appellant had been obtaining from the totality of its charges an amount greater than a fair return. *This again was a basic or essential finding which was omitted.* We show, at page 58 of this brief, that the net return of appellant for the period 1927-1931, under the prescribed rates, would have been only 4.3 per cent of the value of the property used and useful for stockyards services as determined by the Secretary in his first decision of July 20, 1931 (appendix to brief, p. 50).

(c) *The decision contains no findings which support the specific reductions in differing amounts prescribed in paragraph 207 of the decision* (R. 128), nor was any evidence offered on which such findings could have been supported. See pp. 60-69 of this brief. Perhaps this point should be illustrated. The Secretary ordered a reduction in the yardage charge on hogs received by rail from 12 cents to 8 cents

per head, amounting to 4 cents per head, or a reduction of 33 per cent; while he ordered a reduction on hogs received by truck from 14 cents to 12 cents per head, amounting to 2 cents per head, or a reduction of 14 per cent; that is to say, that while the present yardage rate on hogs received by rail is 2 cents less than the yardage rate on hogs received by truck, under the prescribed basis the yardage rate on hogs received by rail will be 4 cents less than the yardage rate on hogs received by truck. The fact that there should be a higher yardage rate on hogs received by truck than on hogs received by rail, as well as upon other species of live stock, is justified by the record and acquiesced in by the Secretary, but the Secretary does not preserve the differential of 2 cents heretofore made by appellant.

Paragraph 202 of the decision (R. 126) contains certain remarks concerning the loading and unloading by appellant of live stock received by rail in carload lots. The Secretary points out that the volume received by rail has been diminishing, which is true. The Secretary further points out in said paragraph that appellant's charge for unloading and loading railroad cars (which is received from and paid by the railroad companies) has been increased. As stated in paragraph 44 of the decision (R. 47), the charge for this service is $1.25 per single deck car and $1.50 per double deck car. The Secretary does not state the amount of the increase. The record shows that the charge for unloading and loading railroad cars was increased in September, 1932, from $1.00 per car to $1.25 for single deck cars, and $1.50 for double deck cars (see respondent's exhibit 152, one of the original exhibits certified with this record).

The Secretary, in paragraph 202, concludes with the statement that "the higher rate now in effect will tend to offset somewhat the loss in unloading and loading revenues on account of the change in method of arrival." But simultaneously, and very inconsistently, the Secretary reduces

the yardage charge on hogs arriving by rail by 4 cents per 100 pounds, while the yardage charge on hogs arriving by trucks is reduced only 2 cents per 100 pounds. Thus, if we estimate that 80 hogs are an ordinary load for a single deck car or 120 hogs for a double deck car, the increase in revenue from the increased unloading charge is about $.0037 per head; but against this slight increase from unloading charges the Secretary has reduced the yardage charge on hogs received by rail 4 cents per head, or ten times the amount of the increase in the unloading charge and twice the amount of the reduction on hogs received by truck.

Substantially the same thing applies to cattle. The yardage rate on cattle received by rail is reduced 8 cents and on those received by truck 5 cents. On the other hand, the yardage charge on sheep is reduced 2 cents per head uniformly, whether received by truck or rail.

There are no findings in the decision to sustain the various reductions so made. Such reductions bear no rational relation to each other. No evidence was offered upon which these specific reductions could have been based. Upon the Secretary's own theory the reductions could be made only because he conceived that appellant had earned a total income from stockyards services in excess of a reasonable return. If such a finding could have been made or justified by the evidence, obviously the only order which could have followed would have been a proportionate reduction in all charges made by appellant.

(d) *The decision makes none of the "basic or essential findings" upon which increases ranging from 71 per cent to 660 per cent in the feed lot charges could have been based.* The decision does not state separately the value of the land and facilities of the feed lots, the income from the feed lots, the expenses thereof, or the net profit or de-

ficit from their operation. The new rates are obviously guess work. There is no finding that the class of live stock held at the feed lots or the operators at the feed lots can or will stand the tremendously increased rates. Nor is there any evidence upon which such a finding could be based.

(e) *The decision contains no specific findings, such as those shown at pages 76-81 of this brief, as to appellant's gradually diminishing receipts of live stock from all sources, including reductions in general yardage charges, sale of feed, loading and unloading, miscellaneous income, etc., during the six-year period.* The only finding permitted by the evidence would have negatived the possibility of reducing appellant's rates. In fact the only findings in the decision are to the same effect. The Secretary refers to the market receipts of live stock in paragraph 199 of the decision (R. 125).

Concerning cattle, the following finding is made: "Following 1925 and continuing until 1931, there was a decrease." The table in paragraph 195 shows that the receipts of cattle in 1932 were more than 50,000 head less than in 1931.

Referring to calves, the Secretary finds in paragraph 199 that there has been a decrease, the receipts of 1931 being about equal to 1918.

Concerning hogs, the Secretary says that since 1928 the tendency has been downward (par. 199). The table in paragraph 195 shows that the receipts in 1928 were 1,594,606 and in 1932 1,148,990 or 445,616 head less.

The decision adopts a prophecy as against a survey. This court has recently remarked that such a prophecy is generally a poor substitute for experience. *West Ohio Gas Co.* v. *Public Utilities Com.*, 294 U. S. 79, 82, 79 L. ed. 773, 776.

We are not to be understood as suggesting that the points here summarized are the only ones in which essential findings are lacking. As to other phases of the case, such as the failure to include the Transit House amongst the used and useful property, there is no finding of changed conditions since the first decision. There is no finding of changed conditions which would justify the conclusion that appellant had a going concern value of $300,000 at the time of the first decision and none at the time of the present decision; that the allowance for depreciation, maintenance, and repairs might properly be $102,000 per annum at the time of the first decision and only $80,000 per annum at the time of the second decision; or justifying a reduction of 36 per cent in land values between the first and second decision.

It is respectfully submitted that for the reasons here stated, and under the rules announced by this court in the cases here cited, the order is void because of the lack of "basic and essential findings."

The Decision of the District Court Does Not Contain Specific Findings of Fact Upon Most Points.

Rule 70½ of the equity rules of this Court provides that the three-judge court shall "find the facts specially and state separately its conclusions of law thereon." Appellant suggests that the decision of the District Court does not fairly comply with this rule.

The District Court promulgated its decision on May 1, 1935. It did not follow the practice of permitting counsel, after the decision, to propose specific findings of fact for the purpose of an appeal. It adopted the findings of fact made by the Secretary (with slight exceptions) and stated that its own opinion included all the further necessary findings of fact. Thus the findings of fact which this Court must consider are to be found scattered throughout the decision of the Secretary, consisting

of 208 numbered paragraphs covering about 105 printed pages of the record, and in the opinion of the District Court, covering 28 pages of the record.

The decree was effective the same day the opinion was handed down. Thereafter appellant sought and obtained a suspension of the decree in order to perfect its appeal (R. 142). The application for the appeal was filed with the court and allowed May 24, 1935. Therewith appellant filed a petition for supplemental findings of fact and conclusions of law (R. 142). That was the earliest time at which it was possible for appellant to call the attention of the court to the fact that it believed that certain important and fundamenal findings had been omitted from the decision. Assuming that the findings would not be made by the court as submitted, appellant also submitted a proposed order permitting said proposed findings to be filed as of May 1, 1935, the date of the decision, and refusing as of that date to make such findings (R. 146). In a letter of June 20, 1935, Judge Merrill E. Otis advised counsel for appellant that "the court does not believe that the order asked by you should be made" (R. 166).

The findings of fact which appellant believes should have been made by the court are a part of the "petition for supplemental findings of fact and conclusions of law", appearing at record 142. It was not possible for appellant to assign error to the refusal of the court to make these findings because the assignments of error had to be filed with the petition for appeal, and the court did not deny the petition for supplemental findings of fact and conclusions of law until approximately a month after the petition for appeal had been filed and allowed.

IV.

THE DISTRICT COURT ERRED IN FAILING TO FIND THAT THE ORDER WAS VOID BECAUSE APPELLANT'S RATES AND CHARGES WERE NOT UNREASONABLE AT THE TIME OF THE HEARING.

Essential facts in connection with this point. The alleged errors of the District Court are set forth more in detail in points 9 and 11 of our statement of points to be relied upon and in the assignments of error referred to in those points (R. 940). The essential facts may be summarized briefly, although the verification of those facts will require some explanation as they are not in any findings in the Secretary's decision, nor in any finding in the opinion of the District Court:

(1) The last year covered by the hearing before the Secretary was 1932 (R. 26).

(2) In paragraph 171 of the decision (R. 116), the Secretary finds that the reasonable annual net operating income which should be obtained by appellant from the operation of its public stockyards is $192,010.

(3) The net operating income obtained by appellant in 1932 under its *present rates,* determined according to the expenses allowed and disallowed by the Secretary, was only $190,656.21, or less than the fair return determined by the Secretary. This undisputed fact is not stated in the decision of the Secretary or in the opinion of the District Court.

Verification of preceding statements of fact. For the purpose of this point only, and without admitting the correctness of the conclusions reached by the Secretary, we here concede every fact found by the Secretary as to the amount of used and useful property, land values, structural values, annual allowance for a depreciation reserve, denial of going concern value, elimination of cer-

tain operating expenses, etc. As to them, error is assigned and the points will be argued in other sections of this brief.

As a basis for the analysis which follows, we here insert a computation showing the results upon appellant's revenues if the yardage, feed, and resale charges, prescribed by the Secretary, had been in effect during the year 1932, the last year covered by the record. The number of head of live stock received will be found in Government exhibit 111, witness Christensen, and the revenue receipts from the yardage charges in force appear in exhibits 121-A, 121-B, and 121-C of Government witness Bufkin; all of which have been certified as original exhibits to this court. The page here inserted is merely a mathematical computation in which the *reduced* rates prescribed by the Secretary are applied to the 1932 business of appellant. The same table was printed in our brief in the District Court and its accuracy was not questioned there.

REDUCTION PRESCRIBED RATES WOULD HAVE MADE IN APPELLANT'S GROSS INCOME IN YEAR 1932.

Line No.	Items	Revenue Units	Rate Charged	Amount	Prescribed Rates	Income from Prescribed Rates	Reduction
1.	Rail Receipts						
2.	Cattle	162,278	$ .35	$ 56,797.30	$ .27	$ 43,815.06	$ 12,982.24
3.	Calves	16,375	.25	4,093.75	.17	2,783.75	1,310.00
4.	Hogs	75,297	.12	9,035.64	.08	6,023.76	3,011.88
5.	Sheep	971,268	.08	77,701.44	.06	58,276.08	19,425.36
6.	Horses & Mules	17	.35	5.95	.35	5.95	.....
7.	Rail Receipts Car Loads						
8.	Calves (1)	93	80/.25	20.00	.17	15.81	4.19
9.	Hogs (6)	712	125/.12	90.00	.08	56.96	33.04
10.	Truck-In-Receipts						
11.	Cattle	181,186	.40	72,474.40	.35	63,415.10	9,059.30
12.	Calves	61,339	.27	16,561.53	.22	13,494.58	3,066.95
13.	Hogs	1,071,772	.14	150,048.22	.12	128,612.76	21,435.46
14.	Sheep	238,711	.10	23,871.10	.08	19,096.88	4,774.22
15.	Horses & Mules	23	.40	9.20	.35	8.05	1.15
16.	Total Yardage Before Trader Yardage			$ 410,708.53		$ 335,604.74	$ 75,103.79
17.	Feed						
18.	Prairie Hay	42,349.78	Cwt. .654	$ 27,726.00	.60	$ 25,409.86	$ 2,316.14
19.	Alfalfa Hay	11,872.15	" .799	9,494.01	.60	7,123.29	2,370.72
20.	Corn	56,914.99	Bu. .564	32,142.55	.50	28,457.50	3,685.05
21.	Oats	1,285.08	" .267	343.64	.25	321.27	22.37
22.	Bedding	11,830	Bbls. .405	4,794.95	.40	4,732.00	62.95
23.	Milled Feeds	7,818.40	Cwt. .531	4,158.25	.80	6,254.72	2,096.47*
	Total Feed			$ 78,659.40		$ 72,298.64	$ 6,360.76
24.	Total Yardage & Feed Before Resale Yardage.			$ 489,367.93		$ 407,903.38	$ 81,464.55
25.	Resale Yardage						
26.	Cattle	18,869	.17½	$ 3,309.66	.17½	$ 3,309.66	$ .....
27.	Calves	1,188	.12½	149.43	.11	130.68	18.75
28.	Hogs	25,224	.06	1,513.44	.06	1,513.44	.....
29.	Sheep	470	.04	18.80	.04	18.80	.....
30.	Grand Total—			$ 494,359.26		$ 412,875.96	$ 81,483.30

*Indicates increase.

Mr. John J. Bachmann was an employee of the Secretary of Agriculture in charge of audits and accounts (R. 443). On behalf of the Government he offered in evidence a statement of appellant's income and expenses for rate making purposes for 1932, which appears at record 573 and has been printed at pp. 64-66 of the appendix to this brief. In that statement, Mr. Bachmann allowed and disallowed certain *income* and *expenses* for rate making purposes. The *expenses* allowed and disallowed by Mr. Bachmann were slightly changed in the decision of the Secretary. The Secretary's revision of Mr. Bachmann's allowance and disallowance of expenses for 1932 appears in paragraph 181 of the decision under the year 1932 in the third column of figures, headed "(3) Expenses Considered" (R. 120). In said third column, the Secretary made all adjustments considered necessary by him on account of expenses incurred in connection with the property determined by him to be not used and useful for stockyards purposes.

It is necessary in order to obtain certain figures not in the table in paragraph 181 of the decision (R. 120), to use certain figures taken from the compilation of Government auditor Bachmann appearing at record 573, 574, 575, appendix to brief pp. 64-66. Every statement made below may be verified from the tabulation in paragraph 181 of the decision or said compilation by Government auditor Bachmann. Under the item "(1) Expenses Per Books" in the tabulation in paragraph 181 of the decision, every figure for 1932 is exactly the same as that appearing in the audit of Government witness Bachmann (R. 574, 575, appendix to brief, pp. 65-66).

Total expenses, 1932. The following figures are taken from the table in paragraph 181 of the decision (R. 120) and the said compilation by Government auditor Bach-

mann (R. 574, 575, appendix to brief, pp. 65-66). The reference marks immediately after the description of the item, with the footnote, give a clear explanation of the source of each figure. They show the expenses for the year 1932 to be:

Expenses approved by Secretary (par. 181 of decision)	$289,539.33
Add thereto:	
Repairs, 1932, actual (1)	19,024.07
Taxes, 1932, actual (2)	43,475.84
Depreciation (3)	41,500.00
Cost of feed, 1932, actual (4)	85,433.60
Total operating expenses for rate making purposes, 1932, approved by Secretary	$478,972.84

(1) Government auditor Bachmann's audit (R. 574, 575, appendix to brief, pp. 65, 66) being the total repair items appearing in the statement of expenses opposite the word "Repairs", excepting the item of $796.72 for "Repairs—Outside Property".

(2) Seventh item in the first column of the tabulation in paragraph 181 of the decision (R. 120).

(3) Paragraph 173-177 of decision (R. 117, 118).

(4) Lines 29 to 33 inclusive of Government auditor Bachmann's audit (R. 574, appendix to brief, p. 65).

In the foregoing computation, all expenses have been modified in accordance with the adjustments made by the Secretary, except where the expenses for 1932 were less than the average allowances fixed by the Secretary. In such instances, we have taken the lower actual expenses instead of the average fixed by the Secretary, including a notable reduction in the item for repairs.

Income. The Secretary does not, in the decision, state appellant's income for any year. We therefore turn to Government witness Bachmann's audit, record 573, appendix to brief, p. 64. In the third column of the tabula-

tion on said page, appellant's total income for rate making purposes for 1932 is shown by Mr. Bachmann to have been $665,618.30. It will be noted, however, that Mr. Bachmann excluded two items which are "Feeding facility yardage" $3,320.75, and "Rental feeding facilities" $690.00. Since the feeding facilities have been included by the Secretary as used and useful, the sum of these two items, amounting to $4,010.75, should be added to the income stated by Government auditor Bachmann, and when that is done the total income for rate making purposes for 1932 becomes $669,629.05, instead of $665,618.30 stated in the Bachmann audit.

These adjustments having been made, we obtain the following result:

APPELLANT'S NET OPERATING INCOME, 1932.

1. Appellant's gross income for rate making purposes 1932	$669,629.05
2. Appellant's expenses for rate making purposes for 1932 as revised by Secretary	478,972.84
3. Appellant's net operating income for rate making purposes for 1932 as determined by Secretary (1 — 2)	$190,656.21
4. Fair return as determined by Secretary (dec., par. 171, R. 116)	$192,010.00
5. Amount by which appellant's income was less than the fair return determined by the Secretary at the time of hearing (4 — 3)	$ 1,353.79

The figures used up to this point were presented in detail in our briefs in the District Court. We do not understand that their accuracy was challenged by the Government.

If in the foregoing statement of expenses we had included the allowance made by the Secretary of $80,000 for depreciation and repairs, instead of only $60,524.07 for that purpose, the total reasonable expenses for 1932 would have been $498,448.77 and appellant's net income for rate mak-

ing purposes $171,180.28, or $20,829.72 less than the Secretary found to be reasonable.

CONFISCATORY RETURN IF PRESCRIBED RATES HAD BEEN IN EFFECT.

This is the result for 1932 under the rates charged by the stockyards and still in effect pending this appeal. *It is not the result which would have followed the much lower rates prescribed by the Secretary.* The reduced rates prescribed by the Secretary applied to appellant's business for 1932 would have diminished appellant's revenue from yardage and feed by $81,483.30, as shown in line 30 of the table on page 41 of this brief. We shall later show that certain credits claimed by the Government for resale yardage and feed lot yardage cannot be realized. If this reduction of $81,483.30 had been taken from appellant's net operating income of $190,656.21, in 1932 appellant's net operating income would have been only $109,172.91 or 3.9 per cent upon the fair value of $2,743,000, found by the Secretary in paragraph 161 of the decision (R. 112).

The situation here is on all fours with that condemned by this Court in *Board of Public Utility Comrs.* v. *New York Teleph. Co.*, 271 U. S. 23, 70 L. ed. 808. In condemning the order in that case, the Court said (p. 31):

> "The just compensation safeguarded to the utility by the 14th Amendment is a reasonable return on the value of the property used *at the time that it is being used for the public service.* And rates not sufficient to yield that return are confiscatory." (Emphasis ours.)

We have here an exactly similar situation.

We repeat that in making this computation we have used not disputed amounts, but have adopted the value, rate of return, operating expenses, *depreciation allowance,* etc., prescribed by the Secretary.

SECRETARY LACKED JURISDICTION TO MAKE ORDER.

For the reasons just stated, it is respectfully submitted that the Secretary had no jurisdiction to make an order reducing appellant's rates, because on the Government's own evidence, the statutory prequisite was lacking in that the rates were not unreasonable at the time of the hearing. Not only are there no *findings* of the Secretary to support a *conclusion* that the rates were unreasonable at the time of the hearing; but the conclusion to that effect stated by the Secretary is contrary to the *indisputable character of his own evidence.* Consequently the order is void under the construction placed by this Court upon the applicable statutes (pp. 24, 25 this brief).

As demonstrated solely by the Government's own evidence, (1) appellant's rates and charges were not unreasonable at the time of the hearing; (2) there was no evidence to support such a finding; (3) no such finding was made; (4) the prescribed rates would have been confiscatory; and consequently the order is void.

V.

THE DISTRICT COURT ERRED IN FAILING TO FIND THAT THE RATES PRESCRIBED BY THE SECRETARY WOULD NOT HAVE PRODUCED A FAIR OR NON-CONFISCATORY RETURN UPON THE FAIR VALUE OF APPELLANT'S PROPERTY USED AND USEFUL FOR STOCKYARDS PURPOSES DURING THE PERIOD OF SIX YEARS PRIOR TO THE HEARING CONSIDERED BY THE SECRETARY IN HIS DECISION.

We have proved that appellant's rates and charges were not unreasonable *at the time of the hearing,* using only the Secretary's conclusions as to values and permissible expenses. We shall now demonstrate that the rates were not unreasonable at any time during the six years considered by the Secretary in his decision. This is no. 12 of

our points to be relied upon, assignments of error nos. 53, 54, 55, 56, 58, 61, 63, 64, 66, 67, 68, and 71.

Comparisons of rate reductions under first and present decisions. A comparison of the first and present decisions of the Secretary reveals that the same so-called spread or gross margin for each class of feed and bedding was prescribed. The present decision, like the first decision, made no change in the charges for certain miscellaneous services, such as loading and unloading railroad cars, Exchange Building rentals, vaccinating and spraying hogs, cleaning and disinfecting pens, dipping, etc. (see pars. 38-40, present decision, R. 43, 44, 45; and first decision, pp. 61, 62 of appendix to this brief). The substantial reductions ordered in both decisions were in the yardage rates. Although the yardage rates prescribed in the first decision and in the present decision were not the same, they produce substantially the same gross yardage income when applied to the receipts estimated by the Secretary in the present decision (Par. 201, R. 126). For example, the total receipts from yardage under the first decision would have been $403,662.50 and under the present decision they would have been $412,775, as applied to said estimated receipts. The conclusion therefore follows that the reductions prescribed by the Secretary in the present decision are substantially the equivalent of those prescribed in the first decision.

Propriety of use of first decision as basis for value 1927-1931. Two valuations have been made by the Secretary of appellant's property used and useful for stockyards purposes in this investigation. The first valuation was determined in the Secretary's decision of July 20, 1931, and the second in the present decision by the Secretary of May 4, 1934. Because of the important bearing of the first decision upon the question whether appellant's rates and

charges were unreasonable at any time prior to 1932, we have printed the first decision in full in the appendix to the brief and shall refer to it to verify any statements of fact taken from it in this portion of the argument.

In dealing with the period prior to 1932, and in comparing net operating income with value for that period, we certainly have a right to treat this first decision and the finding of value of the Secretary therein as the *minimum* value upon which to base a computation for the period prior to 1932, for at least the following reasons:

(a) This valuation was made by the Secretary on July 20, 1931, and was adopted by him as a basis for reducing appellant's rates.

(b) This valuation in the first decision was before a three-judge District Court in *St. Joseph Stock Yards Co. v. United States,* 58 F. (2d) 290. By reference to the footnote appearing on page 295 of said decision, it will be observed that a majority of the court were of opinion that an inadequate value had been placed upon appellant's property and insufficient allowances made for certain major expenses. We quote the relevant portion of that footnote:

> "As to the principal matters in controversy between the parties in connection with the valuation of the petitioner's property, to wit, the value of the lands of petitioner upon which its business chiefly is conducted and the element of going concern value, a majority of the court is of the opinion that the values found by the Secretary are against the weight of the competent evidence. A minority of the court believes that the values as found by the Secretary in these respects are supported by substantial evidence and should be sustained. A majority of the court also is of the opinion that, in determining the net income of the petitioner, the Secretary made an allowance for repairs, maintenance, and depreciation, which was upon the weight of the evidence too small. A minority of the court thinks that the findings of the Secretary in these respects were

supported by substantial evidence, and that his findings should be sustained. A majority of the court is of the opinion that, by reason of insufficient valuation as to properties which were included and of insufficient allowances for maintenance, repairs, and depreciation, the order of the Secretary has been shown to be confiscatory, even without regard to changed conditions. A minority of the court is of the opinion that, if changed conditions be disregarded and the order considered only upon the record made before the Secretary, it should be sustained."

In connection with that decision, the court made certain findings of fact which are included in respondent's (appellant's) exhibit 103 in the present proceeding (one of the original exhibits certified to this court). The court there found that appellant not only would have had no excess earnings for 1930 and for the first six months of 1931 under the rates prescribed by the Secretary in the first decision, but that the rates there prescribed, which were substantially the same as the present rates in their result as to revenue, would have produced a return of only 4.47 per cent for 1930 and less than that amount for 1931 upon the inadequate value determined by the Secretary.

So much is *res adjudicata*. It might well be contended that this decision and finding of the District Court, which was not appealed by the Secretary, is conclusive upon the proposition that appellant's rates and charges were not unreasonable during the period 1930 and 1931. Thus, inasmuch as the rates at present prescribed are substantially the same as those prescribed in the first decision when appellant's income was higher, and since it has been shown that the prescribed rates would have produced a confiscatory return in 1932, and we have a judicial finding to that effect for 1930-1931, it is definitely established that for at least three years (1930-1932) of the six years (1927-1932) considered by the

Secretary in the present decision, appellant's rates could not have been unreasonable. But we do not limit ourselves to reliance upon this finding.

Analysis of value, 1927-1931. For the purpose of demonstrating that the indisputable facts will not support a finding that appellant's rates were unreasonable prior to 1932, *we adopt the findings of the Secretary as to total value of appellant's property as determined in the first decision,* except as to certain comparatively small areas on which a value was not determined by the Secretary in the first decision, where we have used the land value fixed by the Secretary's land appraiser on the first hearing. In the present decision the Secretary included areas of land used and useful for stockyards purposes which were 34.01 acres in excess of the area included in the first decision. This addition, with negligible exceptions, is composed of "feed lots".

In the present decision these "feed lots" are included as used and useful in accordance with appellant's contention throughout this investigation, including the first hearing. The evidence shows that the use of the feed lots at the time of the first decision and prior thereto was the same as at the time of the present decision. The Secretary in effect so finds in paragraph 58 (R. 57) of the present decision, where it is stated:

> "These feedlots are allocated to different persons who use them for the holding, handling and feeding of cattle, hogs and sheep. * * * The allocations have, since the year 1929, remained fairly static."

We have applied to this additional area the unit land values fixed by the Secretary in the first decision in zones A, C, N and 1 (pars. 73, 74, 75, 76, first decision, appendix to brief, pp. 38 and 39); by W. L. Mack, Government land appraiser, first hearing, in zones B and E (R. 185) and zones 2 and 3 (R. 185).

We thus determine that the total value of appellant's property as per the Secretary's determination and evidence, 1927-1931, is as follows:

Total value (first decision, par. 97, appendix to brief, p. 50)	$3,382,148.00
Value of additional land found to be used and useful	329,163.28
Total value, 1927-1931	$3,711,311.28

ANALYSIS OF OPERATING REVENUE, EXPENSES, AND NET OPERATING INCOME FOR RATE MAKING PURPOSES, 1927-1931, DEMONSTRATES THAT THE PRESCRIBED RATES WOULD HAVE BEEN CONFISCATORY DURING THE SIX YEAR PERIOD.

Income for rate making purposes. To summarize this analysis we have prepared a computation, printed at page 55 herein, entitled "Appellant's net operating income, 1927-1931, for rate making purposes." No such analysis as this is made in the decision of the Secretary; in other words, it is another instance in which the Secretary's decision *lacks the requisite findings*. While this same analysis was submitted to the District Court, it is not mentioned in the decision of that court nor is any finding made in connection therewith.

One point it is desired to emphasize in connection with this computation is that every figure in it is taken from the decision of the Secretary (such as the prescribed rates mathematically applied to past business) or from the Government audit of appellant's books for the years 1927-1931, or from the first decision of the Secretary. Inasmuch as this is considered by appellant an important point in this case, the method followed in the computation given below will be explained in necessary detail.

As found by the Secretary in his decision, appellant's income for rate making purposes consists of the gross amounts received for yardage, gross profit on feed, gross

amount received for loading and unloading railroad cars, the gross amount from feed lot yardage, and gross amount from miscellaneous stockyards operations. Appellant had in the past and still has certain income not arising from stockyards operations as, for instance, during 1927 and 1928 it owned a terminal railroad. The profits of that railroad were available for distribution as profits of the stockyards company and at the sale of the railroad the gross amount realized was distributed as a special dividend to the stockholders. Appellant also has certain income from outside properties, such as rental from real estate, buildings, etc., which are not included within its income for rate making purposes and which are excluded by the Secretary as not used or useful for stockyards purposes, and as to which no error is assigned as to the exclusion.

In the computation printed below at page 55, the first item "Yardage received" is stated exactly as it appears in the Government audit, page 3, Government exhibit 121-A (one of the original exhibits certified to this court).

The second item "Feed sales less cost" is taken from the same exhibit and consists merely of subtracting the cost of feed purchased from the amount for which the feed was sold. The gross amounts for which the feed was sold are shown for the several years in lines 2, 3, 4, 5, and 6, page 3, Government exhibit 121-A, and the cost of the feed purchased is shown in items 67, 68, 69, 70, 71, and 72 of page 4, Government exhibit 121-A.

The third item "Loading and unloading cars" represents the exact amounts received, as shown by the Government audit. These amounts are also shown in paragraph 38 (R. 43) of the decision of the Secretary.

The fourth item "Feed lot operations" represents the revenue from that source, as set forth on page 3, Government exhibit 121-A, in lines 27 and 28.

The fifth item "Miscellaneous stockyards operations" is taken from the tabulation appearing on page 3, Government exhibit 121-A, and covers the items shown in lines 7, 10 to 26, inc., 34, 35 and 38.

The items excluded from income are only those for "outside operations" which were excluded by Government witness John J. Bachmann (R. 573) with this exception: we have included one item of income which Mr. Bachmann excluded, namely, that of "feeding facility yardage", because the Secretary has included the feed lots as used and useful.

Expenses for rate making purposes. We now come to the expenses to be deducted from the income for each year. We explain exactly how the total expenses of $463,429.23 for 1931 are computed. We start with the tabulation appearing in paragraph 181 of the Secretary's present decision (R. 120) and find that the expenses which the Secretary included in said tabulation for 1931 amount to $303,765.72. This did not include taxes or depreciation and repairs, because the Secretary made specific allowances for these items in addition to the expenses considered in paragraph 181 of the decision.

For taxes, we have taken for each year the amount actually paid, as appearing opposite the item "taxes" in the tabulation in paragraph 181 of the decision, which for the year 1931 amounted to $57,663.51.

It should be remembered that we are here dealing with the period prior to the decision of May 4, 1934; that we are using the higher values fixed by the Secretary in his first decision of July 20, 1931; and that we therefore properly use the somewhat higher expenses allowed by the Secretary in the first decision, those expenses having unquestionably been necessary during the period covered by the first decision. In the first decision of July 20, 1931, in

paragraphs 105-110, appendix to brief pp. 53-55, the Secretary held that the allowance for repairs, maintenance, replacements, and a reserve for depreciation should be $102,000 per year. We therefore adopt this figure, merely calling attention to the fact that in *St. Joseph Stock Yards Co.* v. *United States,* 58 F. (2d) 290 (footnote, page 295) a majority of the court expressed the opinion that this allowance was inadequate. The three items so described, added together, are as follows:

Expenses (decision, par. 181)	$303,765.72
Taxes	57,663.51
Repairs and depreciation	102,000.00
Total expenses, 1931	$463,429.23

The expenses so determined are then subtracted from the gross income for the year 1931, and it appears that appellant's net operating income for rate making purposes was $223,461.37.

The next computation is to determine how much less that income would have been had the rates prescribed by the Secretary then been in effect. The number of head of live stock yarded, feed sold, etc., are all taken from the Government audit, Government exhibit 121-A. The method followed is exactly similar to the computation appearing on page 41 of this brief. It is merely the mathematical application of the rates prescribed by the Secretary to the live stock yarded and the feed sold within each year, 1927-1931, inclusive.

For each year other than 1931, the income, expenses, and the amount which would have remained had the rates prescribed by the Secretary been in effect are determined in exactly the same manner.

The computation which has just been described is as follows:

Appellant's Net Operating Income, 1927-1931, For Rate Making Purposes.

	1931	1930	1929	1928	1927
Yardage Received (1)	463,326.00	497,131.60	520,086.96	519,677.25	482,735.60
Feed Sales Less Cost (2)	125,095.75	149,994.19	166,989.45	176,320.34	155,513.18
Loading and Unloading Cars (3)	28,422.00	38,091.00	46,179.00	52,011.00	50,031.00
Feed Lot Operations (4)	8,165.82	4,406.73	2,424.00	2,400.00	1,880.00
Miscellaneous Stock Yards Operations (5)	61,881.03	60,431.46	68,651.08	66,793.10	66,641.71
	686,890.60	750,054.98	804,330.49	817,201.69	756,801.49
Less Expenses Allowed (6)	463,429.23	471,025.26	490,203.10	477,934.58	480,149.54
	223,461.37	279,029.72	314,127.39	339,267.11	276,651.95
Less Reduction if Rates Prescribed by Secretary of Agriculture had been in effect	71,882.45	126,158.64	138,870.84	153,989.53	140,474.71
Net Operating Income for rate making purposes under prescribed rate	151,578.92	152,871.08	175,256.55	185,277.58	136,177.24

(1) Page 3, Government exhibit 121-A

(2) Gross Feed Sales shown on Page 3 Government exhibit 121-A and Cost of Feed shown on Page 4 Government exhibit 121-A

(3) Page 3 Government exhibit 121-A

(4) Page 3 Government exhibit 121-A

(5) Page 3 Government exhibit 121-A

(6) Column 3, page 121, exhibit A to petition, plus taxes actually paid as shown in columns 1 and 2 plus depreciation and repairs allowed by Secretary in 1st decision, paragraph 110.

Foregoing computation not affected by amounts actually set aside on appellant's books for depreciation reserve. On the trial below, it was contended by the Government, at page 214 of the Government brief, "that unless the Secretary's findings with respect to the annual allowance for depreciation are incorrect, no confiscation can be demonstrated." We call attention to the fact that in this tabulation we have adhered solely to the income and expenses shown in the Government audit, and for the item of *maintenance, repairs, and depreciation we have not used the figure deemed by appellant to be proper or that set up on its books, but the item of $102,000 allowed in the Secretary's first decision.* If we had used the lesser amount of $80,000 allowed in the present deci-

sion, the net operating income would have been increased by $22,000 and would have been only $173,578.92, or $18,431.08 less than the reasonable return of $192,010 found by the Secretary to be proper in 1934.

Net operating income in 1931. It should be recalled, however, that in 1931 the Secretary held (first decision, par. 119, appendix to brief, p. 59) that under conditions then existing appellant should receive an annual net operating income of $253,661. The net operating income for rate making purposes under the *prescribed* rates in 1931 would have been $151,578 or $102,083 less than the reasonable return determined by the Secretary for that year. The amount of net operating income applied to the value of the property clearly supports the finding of the District Court in *St. Joseph Stock Yards Co.* v. *United States,* 58 F. (2d) 290, at page 296, to the effect that, if the rates prescribed by the Secretary had been in effect, appellant's net operating income in 1930 would not have been more than $151,197, or not more than 4.47 per cent. To be exact, the net operating income of $152,871 for 1930, had the Secretary's prescribed rates been in effect, would have amounted to approximately 4.1 per cent on the value of the property. Under that finding, the Secretary's rates would have produced a confiscatory return in 1930 and in 1931.

We have definitely established (this brief, p. 45) that confiscation would have been the result in 1932. In the present decision of the District Court, 11 F. Supp. 322, at page 336, it is remarked by the District Court that "conditions were abnormal in 1933 and yet are so." It is a strange doctrine under which, over such a period of years, it could be demonstrated that the prescribed rates *would have been* and *are* confiscatory, and yet that they must be established merely upon hope of an improvement in appel-

lant's total business operations and net operating income for rate making purposes.

In view of the position taken by the Government and the District Court, it is desired also to call attention to certain other facts in connection with this computation of value and income. In the District Court, while the Government in substance admitted that the rates prescribed by the Secretary would not have been reasonable at the time of the hearing (1932), it was argued that in prior years appellant had had excess income which could be applied to a reduction in rates for the future. Such a contention was presented at page 212 of the Government's brief in the District Court. Even if this were true, no such appropriation of past earnings could be made. *Board of Public Utility Comrs.* v. *New York Teleph. Co.*, 271 U. S. 23, 70 L. ed. 808, pages 31 and 32. Not only is that contention disproved by the facts, but, as we shall now demonstrate, such a contention cannot be sustained even by including the entire period 1927-1931.

The fair return determined by the Secretary in the present decision of 7 per cent would amount on the above total of values of $3,711,311 to $259,791 per year. In the first decision (par. 100, appendix to brief, p. 51) the Secretary determined that under conditions then existing a fair return would be 7.5 per cent. This would produce an average fair return of $278,348. Appellant's net operating income for rate making purposes for the years 1927-1931, inclusive, as shown in the table on page 55, under its *existing rates,* was an average of $286,507 or only $8,159 per year in excess of the amount which the Secretary's first decision intended to produce as a fair return for that period. This amount is 7.7 per cent of the value of the used and useful property as determined in the second decision but with values which are those determined

by the Secretary in his first decision, except for a few minor tracts of land where we use the values determined by the Secretary's land appraiser.

Prescribed rates would have been confiscatory during entire period considered by Secretary. In the table on page 55, we have set forth appellant's net operating income for rate making purposes for the years 1927-1931, inclusive, both under the existing rates voluntarily established by appellant and under the rates which are *prescribed* by the Secretary in the present decision. As there shown, the *prescribed* rates would have produced an average income over said five years of only $160,232.27, which is but 4.3 per cent of $3,711,311. This return is substantially lower than that sustained by any court, or by this Court, as non-confiscatory, in any of the decisions cited by the Government in its brief in the District Court. Such a return is clearly confiscatory. It was so held in the former trial of this case in *St. Joseph Stock Yards Co.* v. *United States,* 58 F. (2d) 290, where the court held (page 296) that a net return upon appellant's used and useful property of not more than 4.47 per cent was confiscatory.

In *Denver* v. *Denver Union Water Co.,* 246 U. S. 178, 62 L. ed. 649, at page 194, it was held that a net return of 4.28 per cent was confiscatory.

In one of the very recent decisions of this Court, *West Ohio Gas Co.* v. *Public Utilities Com.,* 294 U. S. 79, 81, 79 L. ed. 773, this Court held a return of only 4.92 per cent to be confiscatory.

The rates prescribed by the Secretary would have brought the rate of return for the period 1927-1931, inclusive, or 1927-1932, inclusive, below any level sustained by this court as non-confiscatory.

Facts just stated dispose of Government's contention as to excessive amount of depreciation reserve. As we have stated at a former point, the Government contended in the District Court (Government's brief in District Court, page 214) "that unless the Secretary's findings with respect to the annual allowance for depreciation are incorrect, no confiscation can be demonstrated." The summary just made disposes of this contention. For the year 1932, which was the last year covered by the Secretary's present decision, *we use only $41,500 for a depreciation reserve, and for repairs, not $38,500, but the actual amount shown in paragraph 181 of the Secretary's decision, which is $19,024.07.* For the years 1927-1931, covered by the first decision, *we have used only the allowance for repairs, maintenance, and depreciation of $102,000, fixed by the Secretary in the first decision, instead of the higher amount actually written off by appellant.* Consequently, it cannot truthfully be contended that any excess of past earnings or of present earnings may be taken from appellant because of the setting up of an excessive depreciation reserve, for the reason that in these computations we have used only the allowances for depreciation reserve, or depreciation reserve and repairs, made by the Secretary in said two decisions.

The principle adopted by the court in *Lindheimer* v. *Illinois Bell Teleph. Co.*, 292 U. S. 151, 78 L. ed. 1182, has no application here because the confiscatory character of the rates has been demonstrated, *not by the use of the depreciation reserve set up by appellant but by the use of that determined to be proper by the Secretary.*

The Secretary states in paragraph 168 (R. 115) of his decision that the rates prescribed are based upon detailed studies of the financial operations of the business of the appellant during this six-year period. *The Secretary makes no findings to sustain that conclusion.* We have here presented, from the Secretary's own evidence only, the findings

which should have been made either by the Secretary or the District Court. Clearly they show that the Secretary was without authority to make the order because (1) the rates were not unreasonable at the time of the hearing; and (2) the prescribed rates would have produced a return below the level of confiscation during the entire period upon which the Secretary states that he bases his order.

VI.

THE SPECIFIC REDUCTIONS IN THE RATES AND CHARGES PRESCRIBED BY THE SECRETARY ARE ARBITRARY, BASED UPON NO FINDINGS IN THE DECISION, NOT SUPPORTED BY ANY EVIDENCE OF RECORD, AND ARE THEREFORE VOID.

It was alleged in the petition of appellant in the District Court, part IX, paragraph (N), that the rates and charges prescribed by the Secretary were made without having as a basis any evidence showing, or tending to show, the cost of any service for which the charge is prescribed, or showing, or tending to show, what reduction, if any, might be justified in any specific charge, and without any evidence showing, or tending to show, the relation of the cost of one service to another. The answer of the Government to this allegation (R. 137) appears in substance to be an admission of its accuracy. The defect in this respect is the subject of appellant's assignment of error no. 72 and point no. 19 of appellant's statement of points to be relied upon.

Although this point was presented and argued to the District Court in substantially the same manner in which it is presented here, *the validity of the order or lack thereof upon the grounds stated is not mentioned in the decision of the District Court.* The District Court passed this point without comment.

No attempt was made in the evidence or decision of the Secretary to determine the cost or profit in

connection with any specific stockyards service performed by appellant. No facts or findings are stated as to costs of individual services, nor is any reason stated in the decision for the tremendous variations indicated below in the reductions prescribed by the Secretary in yardage charges, as, for example, a reduction of 8 cents in the yardage charge on cattle received by rail, a reduction of 4 cents in the yardage charge on hogs received by rail, and a reduction of only 2 cents in the yardage charge on sheep received by rail. The apparent theory of the decision is that, having reached the conclusion (*but without findings or evidence to support it*) that appellant's net operating income could be reduced by a certain number of dollars per year, the Secretary decided that he might distribute that reduction to the various services in any manner he deemed proper. That the Secretary was considering merely the total revenue and not the costs of individual services is definitely established by the following quotation from paragraph 40 of his decision (R. 45), reading as follows:

> "A test of the reasonableness of the rates now being charged by respondent is whether the revenue produced by them is substantially in excess of the amount necessary to pay the reasonable cost of rendering the services for which those rates are charged, including in such costs a fair return upon the fair value of respondent's property used and useful in the rendition of such services."

Examination of the entire decision will show that the Secretary made no *specific finding* that the total net operating income received by appellant is in excess of the amount necessary to produce a fair return upon the value of the used and useful property. Based upon prophecies, forecasts, and hypotheses, the decision comes to the conclusion that, if appellant obtains certain receipts, sells certain amounts of feed, and receives certain miscellaneous income, such as rents, certain rates will be sufficiently high; but it is

perfectly apparent that, even though all *specific findings* have been omitted, the only effort made by the Secretary has been to make an estimate that appellant's income, as a total, will be equal to the minimum non-confiscatory return.

That no effort was made to determine the cost of performing any *specific* service, or the extent to which any *specific* charge might properly be reduced, having in mind the elements of cost entering into the service, is undisputed; and is definitely established by the testimony of the Government witness Bachmann under whose direction all the accounting evidence offered by the Government was prepared. The following are excerpts from Mr. Bachmann's testimony:

> "It would require, however, some study and time to determine a basis for the distribution or allocation of all of the various classes of expenses that would come under the heading of overhead to allocate them to the particular service or function. It would require a considerable length of time and study. * * * I shall search the work sheets to determine if they show the number of labor hours which have been used in the performance of railroad loading and unloading and state on the record which of the documents so show. If nothing more is heard from me on the subject, it is proper to assume that the documents do not so show." (R. 463, 464.)

Nothing more was heard from Mr. Bachmann on this subject, as the record will show.

> "Repairs to these particular railroad loading and unloading facilities have not been segregated in my audit. This is also true of electric lighting expense." (R. 464.)

> "I know of no method by which, from facts already in the record, labor costs could be distributed. * * * I have given it no study and those are offhand opinions and are the only ones where offhand a basis comes to my mind readily. * * * It would be quite a lengthy job for me to make a study and investigation to enable me to distribute all the costs among the various func-

tional activities in the respondent stockyards in a manner satisfactory to myself. It would require months." (R. 470.)

"The gross income distribution method does not give a correct result except when the cost of operating a function or department is in the same relationship with the gross income, and the mark up on the commodity sold or on the commodity offered for sale is in the same percentage." (R. 471.)

"If I wanted to find the profit made on feed on the one hand and yardage on the other, I would not attempt to do it on the basis of gross income from each. As to repairs, I am inclined to think I would use value or area. * * * *I have not done this in my audit.* I have not attempted to allocate the repairs to each type of property except to the extent that I did segregate the expenses of the Transit House so far as I was able to do so." (R. 472.) (Emphasis ours.)

The rule stated in the Omaha Stock Yards case is erroneous. Substantially this same point was before a three-judge District Court in *Union Stock Yards Co. of Omaha* v. *United States,* 9 F. Supp. 864, where it is discussed at pages 878 and 879. The court sustained the action taken by the Secretary although the Secretary's answer admitted that there was no evidence as to the value of the particular services to the user, of the relation of one service to another, or of one rate to another, stating:

"the sole test of its validity in this court being whether or not confiscation is proven."

It is respectfully submitted that the decision in the *Omaha case* does not conform to the rules laid down by this Court as to the jurisdictional basis upon which an order may be made by the Interstate Commerce Commission or the Secretary of Agriculture.

At least as applied to federal agencies, this Court requires substantial compliance with the terms of the statute. It is not sufficient to sustain an order merely to say

it does not constitute confiscation. This exact point was before the court in *St. Louis & O'Fallon R. Co.* v. *United States,* 279 U. S. 461, 73 L. ed. 798. We quote the following from pages 487 and 488 of that decision:

> "It was deemed unnecessary by the Court below to determine whether the Commission obeyed the statutory direction touching valuations since the order permitted the O'Fallon to retain an income *great enough to negative any suggestion of actual confiscation.* With this we cannot agree. Whether the Commission acted as directed by Congress was the fundamental question presented. If it did not, the action taken, being beyond the authority granted, was invalid." (Emphasis ours.)

In the petition in this case (R. 1), it was alleged, with respect to the individual and varying charges prescribed by the Secretary, that they were:

1. Unsupported by the evidence of record in said hearing; 2. contrary to the evidence of record; 3. contrary to the weight of the evidence; 4. arbitrary; 5. confiscatory.

These allegations set up two distinct violations of appellant's statutory and constitutional rights against which this Court will afford relief if the allegations are sustained. If appellant is correct with respect to allegations 1-4, it is entitled to have the order permanently enjoined, even though it may not result in confiscation of appellant's property. The Secretary may not prescribe rates on the basis of mere caprice, even if the prescribed rates fall short of confiscation.

THE INEPT CHANGES PRESCRIBED IN APPELLANT'S RATES.

The following tabulations show under the word "present" the yardage rates now in effect, pending this appeal; under the word "prescribed" the yardage rates prescribed by the Secretary for the future; and under the word "reduction" the amount of reduction in cents per head and in per cent.

		Present	Prescribed	Reduction
Cattle	Rail	35¢	27¢	8¢—23 per cent
	Truck	40¢	35¢	5¢—12.5 " "
Calves	Rail	25¢	17¢	8¢—32 " "
	Truck	27¢	22¢	5¢—18.5 " "
Hogs	Rail	12¢	8¢	4¢—33 " "
	Truck	14¢	12¢	2¢—14 " "
Sheep	Rail	8¢	6¢	2¢—25 " "
	Truck	10¢	8¢	2¢—20 " "

In the first decision the reductions made by the Secretary, with the percentages thereof, were as follows:

		Present	Prescribed	Reduction
Cattle	Rail	35¢	28¢	7¢—20 per cent
	Truck	40¢	33¢	7¢—17.5 per cent
Calves	Rail	25¢	18¢	7¢—28 per cent
	Truck	27¢	21¢	6¢—22 per cent
Hogs	Rail	12¢	10¢	2¢—16 per cent
	Truck	14¢	12¢	2¢—14 per cent
Sheep	Rail	8¢	7¢	1¢—12.5 per cent
	Truck	10¢	9¢	1¢—10 per cent

As to feed spreads, appellant's feed spread or margin on hay in 1982 was 67.4 cents per cwt., and on corn 56.4 cents per cwt. See table, p. 41. The Secretary has prescribed a spread of 60 cents on hay and 50 cents on corn, being a reduction of 7.4 cents on hay and 6.4 cents on corn, amounting to 10.9 per cent for hay and 11.3 per cent for corn.

On the other hand, many of the charges made by appellant's tariff are unchanged by the Secretary's order, whereas a proportionate reduction in all charges would have indicated a reduction in the charge for other services as well as for yardage and feed. We list below the services for which the order prescribes exactly the same charge now contained in appellant's tariff.

DIPPING & SPRAYING.

	Present	Prescribed	
Cattle	35¢ per head	35¢ per head	no change
Calves	15¢ " "	15¢ " "	" "
Hogs	5¢ " "	5¢ " "	" "
Sheep or Goats	5¢ " "	5¢ " "	" "

HOG IMMUNIZING

	Present	Prescribed	
	10¢ per head	10¢ per head	no change

CATTLE TESTING BARN.

	Present	Prescribed	
	$1.00 per head	$1.00 per head	no change

CLEANING & DISFECTING.

	Present	Prescribed	
Single pens	$2.50	$2.50	no change
Double pens	4.00	4.00	" "
Chutes	2.50	2.50	" "
Alleys	.37 per 100 sq. ft.	.37 per 100 sq. ft	" "
Wagons & small trucks	.75 each	.75 each	" "
Trucks—2 tons and over	1.00 "	1.00 "	" "

BEDDED & SHELTER PENS.

	Present	Prescribed	
Bedded pens for hogs	$1.00 per car per night	$1.00 per car per night	no change
Bedded pens for hogs	.50 per ½ car-load per night	.50 per ½ car-load per night	no change
Bedded pens for hogs truck division	.15 per pen per night	.15 per pen per night	no change
Shelter pens for cattle	.10 per head each 24 hours	.10 per head each 24 hours	" "
Shelter pens for calves	.05 per head each 24 hours	.05 per head each 24 hours	" "
	$2.00 minimum each pen	2.00 minimum each pen	" "

SPECIAL SALE BARN.

	Present	Prescribed	
Cattle	$ .35 per head yardage	$ .35 per head yardage	no change
Cattle	1.00 " " stall	1.00 " " stall	" "
Cattle	1.00 " " ring free	1.00 " " ring free	" "
Hogs	.12 " " yardage	.12 " " yardage	" "
Hogs	.35 per pen per day	.35 per pen per day	" "
Hogs	.50 per head ring free	.50 per head ring free	" "

WEIGHING THROUGH SHIPMENTS OF LIVE STOCK.

	Present	Prescribed	
	$2.00 per car	$2.00 per car	no change

The Secretary also authorized an increase, which will be discussed at another point, in the charges made for live stock held in the feed lots. The increase authorized, with the resulting percentage change in rates, is indicated in the following tabulation:

AUTHORIZED INCREASE IN CHARGES.

	Present	Prescribed	Increase
Cattle—Feedlot.....	35¢	60¢	25¢— 71 per cent
Hogs "	5¢	38¢	33¢—660 " "
Sheep "	5¢	38¢	33¢—660 " "

The Secretary reduced the yardage charge on rail shipments of cattle.....8 cents.

The Secretary reduced the yardage charge on truck shipments of cattle.....5 cents.

Thus making the difference between the rail and truck yardage charge on the larger species.....8 cents per head.

The Secretary reduced the yardage on rail shipments of hogs .....4 cents
on truck shipments of hogs.....2 cents
and on rail shipments of sheep.....2 cents
and on truck shipments of sheep.....2 cents.

This brings it about that, if the prescribed rates are approved, the yardage charge on rail receipts of hogs will be 4 cents per head less than on truck receipts, and on rail shipments of sheep 2 cents less than upon truck receipts. We challenge counsel for the Government to point to a scintilla of evidence which will justify a greater reduction in yardage for rail than for truck shipments.

These reductions on each of the species have the following range in percentages, being listed below from the lowest percentage reduction, in order, to the highest:

Truck—	Cattle	12.5	per cent
"	Hogs	14	" "
"	Calves	18.5	" "
"	Sheep	20	" "
Rail —	Cattle	23	" "
"	Sheep	25	" "
"	Calves	32	" "
"	Hogs	33	" "

These reductions bear no relationship to any evidence of record nor could any findings have been made upon the evidence which would have justified the prescription of the specific rates named in the order.

If it could have been found that the totality of appellant's net operating income was unreasonable at the time of the hearing, the only order which could have been justified would have been a proportionate percentage reduction in all of appellant's charges. It will be noted, however, that the reductions in yardage made by the Secretary range from 12.5 per cent to 33 per cent; the reductions in feed charges from 10.9 per cent to 11.3 per cent; and the increases authorized in feed lot charges from 71 per cent to 660 per cent.

The decision of the Secretary indicates (par. 195, R. 123) that in 1932 there were received at appellant's stockyards 1,148,990 hogs. Assuming that the Secretary intended to make a reduction in appellant's revenue of approximately $81,000 (as indicated by the application of his rates to appellant's 1932 business), it is obvious that that purpose could have been accomplished just as effectively by reducing the yardage rates on hogs 7 cents per head and making no reduction in other yardage rates or feed profit. Such action would have found equal support in the record and findings.

It is respectfully submitted that, under the decisions of this court, and in the light of the evidence of record, appellant is entitled to have the order declared void because it is (1) arbitrary in the legal sense; (2) unsupported by any findings; and (3) unsupported by any evidence.

VII.

THE DECISION OF THE SECRETARY WAS ERRONEOUSLY PREDICATED UPON SPECULATION AND PROPHECY AS TO INCREASED REVENUE WHICH WOULD BE OBTAINED BY APPELLANT.

This point is no. 10 of our points to be relied upon, and is covered by assignments of error nos. 53, 57, 60, 65 and 69. This court declared, at the last term, that "prophecy, however honest, is generally a poor substitute for experience". *West Ohio Gas Co.* v. *Public Utilities Com.*, 294 U. S. 79, 82, 79 L. ed. 773, 776.

We deem it proper to indicate the extent to which the order is based upon prophecy and speculation concerning increased revenue which may accrue to appellant from increased receipts of live stock, in contrast with the actual receipts of live stock and the revenue accruing therefrom at the time of the hearing.

The amount of revenue which should be received by appellant from its various stockyards operations (principally yardage and feed) is stated in various paragraphs of the Secretary's decision. The receipts of live stock for a period of six years ending with 1932 are stated in paragraph 195 of the decision (R. 123). The receipts estimated by the Secretary for the future as a basis for the rates prescribed by him are stated in paragraph 201 of the decision (R. 126). The total revenue anticipated by the Secretary from the various charges prescribed by him is stated in paragraph 208 of his decision. (R. 129).

The whole order is based upon a series of assumptions, speculations, and prophecies which may be summarized as follows:

if appellant obtains the receipts estimated in paragraph 201 of the decision (R. 126);

if appellant sells the amount of feed estimated in paragraph 204 of the decision (R. 127);

if appellant receives the income from miscellaneous operations estimated in paragraph 208 of the decision (R. 129);

if appellant receives the loading and unloading revenue estimated in paragraph 208 of the decision (R. 129);

if appellant's expenses for repairs and depreciation are as estimated in paragraph 177 of the decision (R. 118);

if appellant's taxes are as estimated in paragraph 180 of the decision (R. 119);

if appellant's other expenses are as estimated in paragraph 193a of the decision (R. 123);

then appellant will receive a net operating income of $192,010 per annum under the prescribed rates.

The tables given below are merely mathematical applications of the rates prescribed by the Secretary (decision, par. 207, R. 128) to his estimated receipts of live stock, as well as the revenue to be received from feed lot yardage, resale yardage, miscellaneous charges, etc., *compared with the actual result of applying the charges prescribed by the Secretary to each class of business done by appellant in 1932.*

YARDAGE REVENUE ESTIMATED BY SECRETARY.

(See par. 201 of Secretary's decision (R. 126) and multiply estimated receipts by prescribed rates.)

Cattle—truck	260,000 @ 35¢	$ 91,000
rail	140,000 " 27¢	37,800
Calves—truck	70,000 " 22¢	15,400
rail	15,000 " 17¢	2,550
Hogs —truck	1,206,250 " 12¢	144,750
rail	68,750 " 8¢	5,500
Sheep—truck	300,000 " 8¢	24,000
rail	900,000 " 6¢	54,000
Full yardage estimated in decision		$375,000
Yardage at *prescribed* rates on *actual* receipts in 1932		335,604
Excess of estimate as applied to 1932 business		$ 39,396

RESALE CHARGE ESTIMATED BY SECRETARY.

(See par. 201 of Secretary's decision (R. 126) and multiply estimated head under resales by prescribed rates.)

Cattle	75,000 @ 17.5¢	$ 13,125
Calves	5,000 @ 11¢	550
Hogs	200,000 @ 6¢	12,000
Sheep	2,500 @ 4¢	100
Total resale revenue estimated in decision		$ 25,775
Actual resale revenue at prescribed rates in 1932		4,972
Excess of estimate as applied to 1932 business		$ 20,803

FEED LOT YARDAGE ESTIMATED BY SECRETARY.

(Multiply numbers under feed lot, par. 201 of Secretary's decision (R. 126), by prescribed rates.)

Cattle	5,000 @ 60¢	$ 3,000
Hogs	1,200 @ 38¢	456
Sheep	85,000 @ 38¢	32,300
Revenue estimated by Secretary		$ 35,756
Actual revenue on basis of prescribed rates in 1932		21,743
Excess of estimate as applied to 1932 business		$ 14,013

REVENUE FROM FEED SALE.

Revenue from feed on quantities estimated in par. 204 and margins prescribed in par. 207 of Secretary's decision (R. 127, 128)	$ 78,800
Total revenue from feed in 1932	72,298
Excess of estimate over 1932 business	$ 6,502

REVENUE FROM MISCELLANEOUS CHARGES.

Estimated income from loading and unloading rail shipments (par. 208 of Secretary's decision (R. 129)	$22,500
Actual revenue from loading and unloading 1932 (R. 573)	19,592.25
Excess of estimate over 1932 business	$ 2,907.75
Income from miscellaneous stockyards operations estimated in par. 208 of Secretary's decision (R. 129)	$68,000.00
Actual income from miscellaneous stockyards operations (R. 573)	53,084.15
Excess of estimate over 1932 business	$14,915.85

SUMMARY OF ERRORS IN ESTIMATES.

Reasonable gross income as per par. 208 of Secretary's decision (R. 129)		$618,277
Prescribed rates applied to 1932 business:		
Full yardage	$335,604	
Income from sale of feed	72,298	
Income from loading and unloading	19,592	
Feed lot yardage	21,743	
Resale and reweigh charge	4,972	
Miscellaneous income	53,084	507,293
Deficit below reasonable gross income 1932		$110,984

It is estimated in the Secretary's decision (par. 208, R. 129) that under the prescribed rates appellant would receive a total gross revenue of $618,277. As we have demonstrated, if the prescribed rates had been applied to

the 1932 business, they would have produced $110,984 less gross revenue than that estimated by the Secretary, which would have reduced appellant's gross revenue to $507,293. If from this there were subtracted the reasonable operating expenses of $426,267, estimated by the Secretary in paragraph 208 of his decision, there would have remained to appellant only $81,026, or a return of approximately 2.95 per cent upon the fair value of $2,743,000 determined by the Secretary.

The facts stated above, all of which are mere mathematical computations taken from the Government's own evidence and from statements in the decision of the Secretary, demonstrate a disregard of the rules laid down by this Court in its construction of the statute, as well as the confiscatory character of the order. So far as this point is concerned, it is evident that it is not necessary for the Court to weigh conflicting evidence with respect to land values, structural values, income, annual depreciation reserve, and other operating expenses. We shall ask it to do so in other parts of the brief, for the record estabishes a right to a net income much in excess of $192,010 per year; but the decision condemns itself as violative of the statutory rules, and the order is based solely upon assumptions, speculations and prophecies, so far from the facts as to constitute an arbitrary abuse of discretion and plainly to result in confiscation. It is respectfully submitted that upon this point alone appellant is entitled to a reversal of the decree.

VIII.

IT WAS ERRONEOUS, AND CONTRARY TO THE INDISPUTABLE CHARACTER OF THE EVIDENCE, TO BASE ESTIMATES OF INCREASED REVENUE FOR THE FUTURE UPON A STUDY OF SIX YEARS, CONTRARY TO THE EVIDENCE WHICH DEMONSTRATES GRADUALLY DIMINISHING RECEIPTS THROUGHOUT THE PERIOD STUDIED.

This is in substance no. 10 of our points to be relied upon (R. 940), covering assignments of error nos. 53, 57, 60, 65 and 69 (R. 157, 158, 159) and included in proposed findings of fact nos. 17 and 18 (R. 144). The only finding in the decision of the Secretary upon which his order could be predicated is stated as follows in paragraph 168 of the decision (R. 115):

> "The rates hereafter prescribed in this order are based upon detailed studies of the financial operations of the business of the respondent during this six-year period, and upon a consideration of the history of the company and other facts with respect to it extending over a much longer period."

There are no findings which set forth the studies of the "financial operations of the business" during this six-year period, except the tabulation in paragraph 181 of the decision showing *expenses only.* In other words, this finding upon which the order is based is "a mere declaration of a commission" and "is not conclusive". *Great Northern R. Co.* v. *Minnesota,* 238 U. S. 340, 59 L. ed. 1337.

There are no specific findings as to appellant's net operating income from its stockyards operations as a whole or from any division thereof in any one of the years included in the six-year study or in a combination of any of them.

It is respectfully suggested also that this matter was inadequately treated in the opinion of the District Court. All of the facts presented in this brief were presented in substantially the same manner and in even greater detail in our brief before the District Court. This was a vital

point in the case. All that is stated in the opinion of the District Court (11 F. Supp. 322, 336) is the following:

"(C) Test Period.

(30) The Secretary used an estimated future volume of business to test the net return which would probably be received. This he used to ascertain if the particular rate schedule covered by the order would yield a net return equal to 7 per cent. In this estimate he states the numbers of different kinds of stock going to make up this volume. This estimate seems based upon actual receipts for the years 1928-1932. A comparison of the figures in the estimate (finding 201) with those of actual receipts for the above years (finding 195) convinces that his estimate is conservative if the actual receipts are at all any fair basis from which to reason. Petitioner attacks this period of experience as no proper criterion of the future volume. *It is true that conditions were abnormal in 1933 and yet are so, but there is no way of prophesying the future except by the past.* There may well be a reduced volume of receipts below the normal for the period chosen. *However, what, if any, reduction will occur is a matter purely of opinion,* and we can see no reason for thinking our opinion or that of petitioner would be more accurate than that of the Secretary. Certainly this is not convincingly shown." (Emphasis ours.)

The opinion of the District Court upon the entire subject matter argued in chapters IV-VIII hereof (covered by the single paragraph above quoted, entitled "Test Period") indicates that appellant's rates and charges may be reduced as the result of mere speculation, in which the Secretary has the right to make all of the assumptions, and appellant must bear the burden of erroneous forecasts. We submit that the Secretary should have waited until appellant's receipts of live stock and its income rose above a fair return before reducing the income. There is no room for the exercise of opinion when appellant's income was below the reasonable level at the time of the hearing.

The court remarks that it is "a matter purely of opinion" and that it "can see no reason for thinking our (the court's)

opinion or that of petitioner (appellant) would be more accurate than that of the Secretary." We submit that the question is not one which should be determined by mere conjecture on the part of the Secretary, the District Court, or appellant. On the contrary, there is evidence in the record which should have controlled the judgment of the Secretary. All of the evidence upon this point necessary to be considered was presented by the Government witnesses, although it was also corroborated by appellant's evidence. That evidence disclosed only one outstanding factor, namely, *diminishing receipts of live stock and diminishing revenue during the so-called test period of six years.*

As to receipts of live stock, the elaborate study in the record was made by the Government witness, Mr. Christensen (R. 408). This study is in Government exhibit 108, part I, at pages 11-36. This is one of the original exhibits certified to this court.

The court will search the record in vain for any evidence which supports the conclusions respecting fluctuations in market receipts and the basis for the estimate of receipts appearing in paragraphs 199 and 200 of the Secretary's decision (R. 125, 126), which form the basis of the estimate of receipts contained in paragraph 201 of the decision and the reduction in rates. A different conclusion is required by the evidence.

Two facts, as distinguished from assumptions, are stated in these paragraphs of the Secretary's decision. The first appears in paragraph 199:

> "Since 1928, the tendency has been downward."

The second is in paragraph 200:

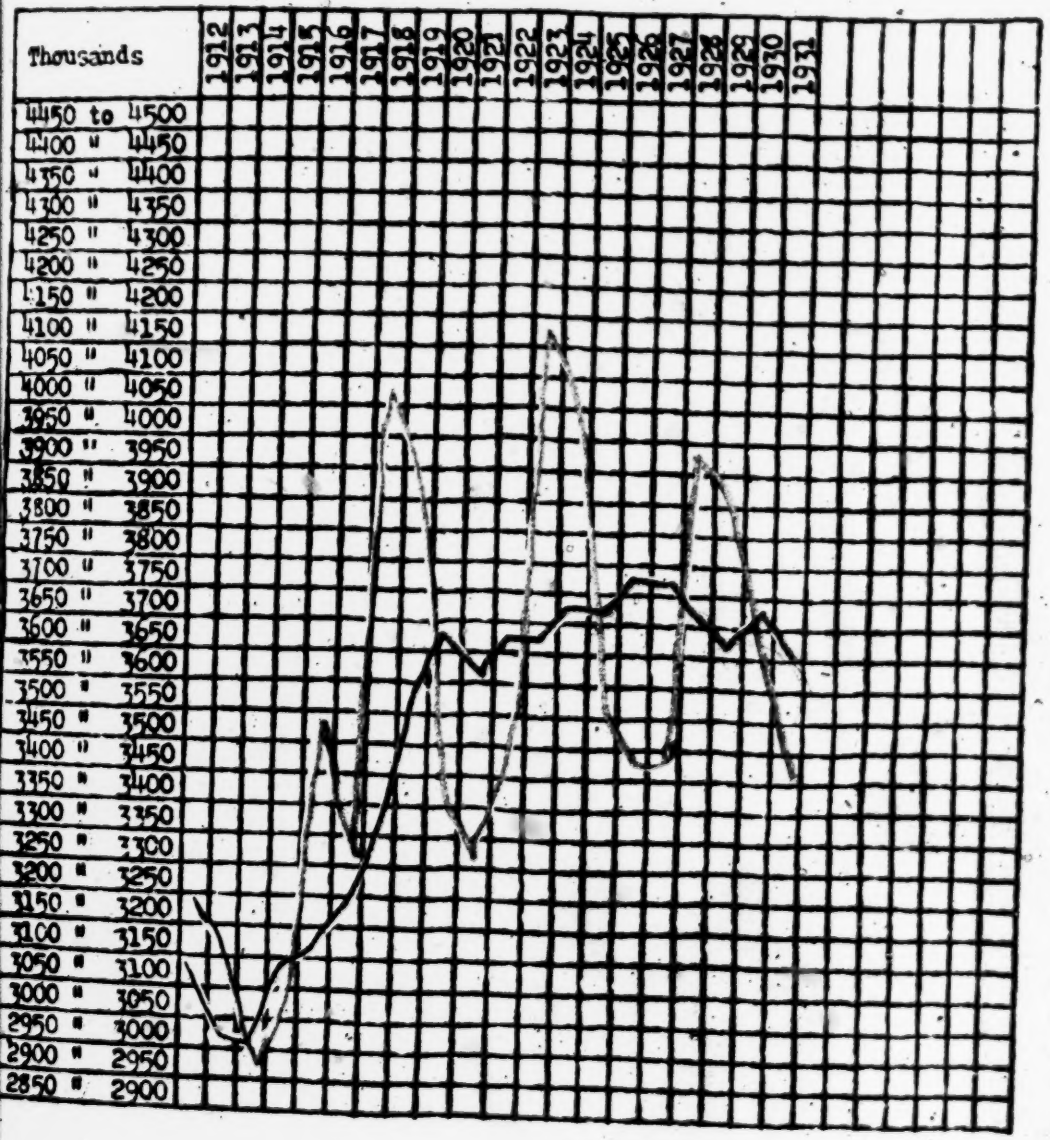
> "The years immediately preceding the dates of the hearings were years of comparatively low receipts."

Government witness Christensen stated that the important factor in predicting receipts is the five-year moving average shown in the tabulation on p. 12 of Government exhibit 108, part I (R. 408). A graph of the five-year

moving average appears on page 13 of Government exhibit 108. For convenience, this graph is here reproduced.

RECEIPTS OF LIVESTOCK

ALL SPECIES
Except Horses & Mules



Scale 50,000 to One
Red: Annual Receipts
Blue: Average Annual Receipts, five year moving periods.

The figures as well as the graph show that since 1926 there has been a downward tendency in the receipts of all species. The graph does not carry the computation through 1932, but by reference to page 14 of Government exhibit 111, (certified with the record) it will be observed that the total receipts of cattle, calves, hogs, and sheep in 1932 were 2,954,572 head *or 447,713 head less than the receipts in 1931.*

In connection with this exhibit, Government witness Christensen testified as follows:

> "The important factor is a five-year moving average. It shows the trend of most species of livestock downward. * * * I do not think the trend is an absolute governing factor as to whether the receipts will be larger or smaller in 1933 than in 1932. * * * It indicates that, judging by the past and other information which I would use in reaching conclusions, *receipts are not going to increase materially.* There may be a little increase from year to year or from month to month, but I do not see anything in the situation to lead me to believe there will be any appreciable increase." (R. 408.) (Emphasis ours.)

At the time of this decision the Secretary was using his statutory powers to reduce hog production. Before the Secretary announced this decision on May 4, 1934, and before the District Court announced its decision, the *agricultural adjustment act* (May 12, 1933, U. S. C. A. tit. 7, §§ 601-619) had been enacted. The Secretary of Agriculture had already inaugurated his corn-hog program the avowed purpose of which was to reduce the production of hogs by 25 per cent. The consequent reduction of hog production was much greater than had been anticipated by the Secretary. In this connection attention is called to the results for 1935, shown on p. 183 hereof in connection with our discussion of the denial of appellant's petition for rehearing. As a matter of fact, appellant's receipts of hogs have now been reduced by more than half compared with 1932.

At the time of this decision, the Secretary was in the inconsistent position of using his power under said statute to effect a 25 per cent reduction in the number of hogs to be marketed; and contemporaneously in his capacity as the regulating authority under the *Packers and Stockyards Act, 1921,* of predicting in this decision an increase in receipts of hogs to be marketed at appellant's stockyards.

Trend of appellant's income prior to hearing. The same trend is shown in appellant's income from its stockyards services as is shown in connection with live stock receipts. *No finding as to this income is made by the Secretary or the District Court for the six years upon which the decision is said to be based.* The facts upon which such a finding could and should have been made are, however, found in the Government's audit. This audit was made by Mr. H. E. Bufkin, field auditor for the Packers and Stockyards Division, United States Department of Agriculture (R. 440-443). The audit described in Mr. Bufkin's testimony is contained in Government exhibits 121-A, 121-B, and 121-C. These are among the original exhibits certified to this court in connection with the record. The income which the Secretary considers income for rate making purposes (Secretary's decision, par. 208 R. 129), the source of the figures in the Government audit, is as follows:

1. Yardage (p. 3 Government exhibit 121-A, p. 3 Government exhibit 121-B, and p. 4 Government exhibit 121-C).

2. Profit on feed and bedding. (Taken from gross feed sales shown on sheet 3 Government exhibit 121-A for all years except 1932 and cost of feed sales shown on page 4 of Government exhibit 121-A. Figures for 1932 taken from audit Government witness Bachmann (R. 573).

3. Loading and unloading. (Taken from p. 3 Government exhibit 121-A for years 1927-1931, inclusive, and Government audit for 1932 (R. 573).

4. Feed lot yardage. (p. 3 Government exhibit 121-A for 1927-1931, inclusive, R. 573, for 1932).

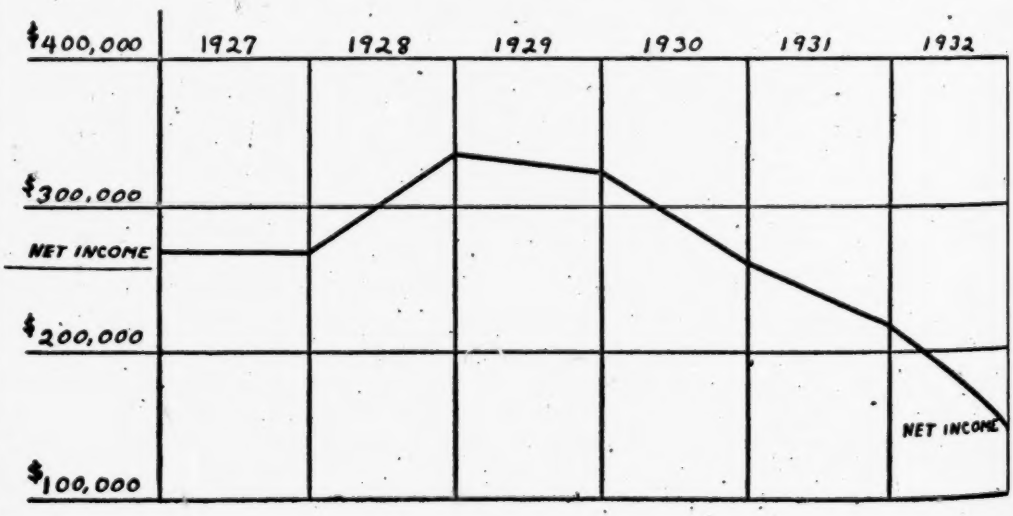
5. Miscellaneous stockyards operations. (p. 3 Government exhibit 121-A for 1927-1931, inclusive, and R. 573, for 1932).

The following table shows the above figures for these five items of stockyards income for rate making purposes by years for the period 1927-1932 inclusive, as obtained from the sources indicated above.

Year	Yardage	Profit on Feed and Bedding	Loading and Unloading	Feed Lot Yardage	Miscellaneous Stockyards Operations
1927	$482,735.60	$155,513.18	$50,031.00	$1,880.00	$66,641.71
1928	519,677.25	176,320.34	52,011.00	2,400.00	66,793.10
1929	520,086.96	166,989.45	46,179.00	2,424.00	68,651.08
1930	497,131.60	149,994.19	38,091.00	4,406.73	60,431.46
1931	463,326.00	125,095.75	28,422.00	8,165.82	61,881.03
1932	415,680.53	72,298.00	19,592.25	3,320.75	53,085.15

In order to visualize the trends here shown, we insert the following graph which charts appellant's net income, 1927-1932, in accordance with the expenses allowed by the Secretary. See table p. 55 herein.

GRAPH SHOWING TREND OF APPELLANT'S INCOME, 1927-1932, INC.



Reasons for diminishing receipts of live stock and revenues. The record shows a falling off in business not accounted for by the depression. Some of the reasons are stated in the testimony of Mr. C. F. Topping, appellant's president (R. 825-826). Mr. Topping testified that appellant has encountered additional competition since 1929; there has been more of a tendency for packers to buy hogs direct at country points rather than at St. Joseph and other public markets; there has been an increased tendency to buy stocker and feeder cattle and calves at country points and at ranches; and these tendencies were evident before the depression was felt. Mr. Topping expressed the opinion, based upon his experience and in view of the tendencies mentioned, that appellant could not reasonably anticipate increased receipts in the future and that an average of the gross and net income for the years 1927-1932, inclusive, would not be a fair basis upon which to estimate appellant's net income for the next few years (R. 826).

The reduction in profit from feed sales appears also to be permanent. A great increase in receipts of live stock at the yards by truck rather than by rail is shown in Government witness Christensen's exhibit 108, part I, pages 11-36. The result of this change from receipts by rail to receipts by truck upon the amount of feed sold was the subject of a study by one of appellant's witnesses (R. 877). The fact is that, in connection with movements by truck, the shipper either feeds the live stock before it is placed upon the truck or the trucker carries feed along in the truck, so that the necessity for purchasing feed at the stockyards while the live stock is awaiting sale is much reduced. The amount of feed sold is lessened also by the reduction in the total receipts of live stock. In view of the fact that the

arrival of the major portion of live stock by truck is a condition which appears to be permanent, there is no reason to believe that the profits from the sale of feed will ever again exceed those for 1932.

The total revenue from loading and unloading railroad cars dropped from $50,031 in 1927 to $19,592 in 1932. This again is due to the fact that the major portion of the live stock is now brought to the stockyards by truck rather than by rail. No specific charge is made for unloading trucks. Government exhibit 108, pages 27-36, inclusive, (one of the original exhibits certified in this case) is a study of the movement of live stock to appellant's stockyards by rail and truck in the years 1893 to 1931, inclusive. It shows a gradual and substantial increase in the receipts by truck from the year 1920 onward. In 1927, 79 per cent of the live stock (based upon number of head) arrived by rail and 21 per cent by truck, whereas in 1931 52 per cent arrived by rail and 48 per cent by truck. In 1932, 49 per cent arrived by rail and 51 per cent by truck (R. 883). Inasmuch as this loading and unloading revenue comes only from unloading and loading railroad cars, there is no reason to assume that the revenue from this source will ever exceed that in 1932.

The reduction in income from miscellaneous stockyards operations (principally rental from the Exchange Building) has not been so marked as the reduction in some other classes of revenue; but there is no reason to assume that it will increase in the future. In 1932 it was only $53,084, but in estimating income for the future the Secretary assumes the revenue from miscellaneous stockyards operations at $68,000 (Secretary's decision, par. 208, R. 129). There is no evidence in the record which would justify a finding that this class of revenue will be increased by approximately $15,000 a year.

To base reduced rates upon predictions of increased revenue was contrary to indisputable character of the evidence and therefore arbitrary and void. While no specific findings are made in the decision of the Secretary upon the facts here summarized, it is evident that, in prescribing a basis of rates for the future, the Secretary disregarded the trends in appellant's business during recent years. It was *arbitrary* for the Secretary to disregard the guiding finger of the evidence and to substitute his own speculation and prophecy, especially at a time when appellant was not, upon the Secretary's own proof, receiving even the fair return determined by the Secretary.

The Secretary and the District Court fell into an error which may perhaps best be explained by an illustration. The Secretary in his first decision fixed a certain value. In this decision he fixed a lower value. It could only be by comparing the *present lower* value with *higher* income in *past* years that a conclusion could be reached that appellant's present rates are unreasonable. Let us assume that a utility operated a property of a fair value of $1,000,000 in 1927; that thereafter there was a general decline in price levels as well as a decline in the amount of business done by the utility; that in each year thereafter the fair value of the utility declined $100,000; and that in each year the utility earned exactly 7 per cent upon the fair value in that year. The result would be expressed as follows:

	Fair Value	Net Income
1927	$1,000,000	$70,000
1928	900,000	63,000
1929	800,000	56,000
1930	700,000	49,000
1931	600,000	42,000
1932	500,000	35,000
Average	$ 750,000	$52,500

The net income each year would have been exactly 7 per

cent of the fair value for that year; and the average net income would have been 7 per cent of the average value during the said six years. But, to borrow the language of the Secretary (decision, par. 168, R. 115), "based upon detailed studies of the financial operations of the business" of the company "during this six year period" and applying them to the 1932 value, the conclusion would follow that the company had a net income of 10.5 per cent upon its fair value ($52,500 ÷ $500,000) and, therefore, the rates were unreasonable. If trends in income and values need not be matched against each other, then any *past* period of prosperity as to income may be matched against any *present or future depressed value* of the property to show that the *present rates* are unreasonable. To attempt to base a conclusion upon such unrelated facts is arbitrary.

IX.

THE DISTRICT COURT ERRED IN FAILING TO FIND THAT AT THE TIME OF THE HEARING APPELLANT WAS APPLYING A RESALE CHARGE EQUIVALENT TO THAT PRESCRIBED BY THE SECRETARY UPON ALL SHIPMENTS OF LIVE STOCK TO WHICH SUCH CHARGE COULD BE APPLIED UNDER THE SECRETARY'S ORDER; THAT THEREFORE APPELLANT COULD NOT OBTAIN FROM SUCH CHARGES AS WERE PRESCRIBED BY THE SECRETARY THE INCREASED REVENUE CONTEMPLATED IN THE DECISION AND ORDER OF THE SECRETARY; AND THAT THE SECRETARY'S FINDINGS IN RESPECT THERETO WERE SPECULATIVE, CONTRARY TO THE EVIDENCE, AND BEYOND THE STATUTORY POWER OF THE SECRETARY.

The issue with respect to the revenue to be obtained from a charge of one-half of the regular yardage charge upon live stock "resold or reweighed for purpose of sale" was raised by section IX, paragraph (L) of appellant's petition in the District Court (R. 13). It was in substance alleged that the order of the Secretary in this con-

nection did not make any finding that appellant's practices were unreasonable or unjustly discriminatory; that the Secretary ordered appellant's rates and charges reduced, in part upon the assumption that it would receive additional revenue from a new source, namely, said half yardage charge; that basing the reduction of appellant's rates in part upon additional revenue to be derived from the resale charge was not justified by any evidence of record, was arbitrary, and confiscatory of appellant's property. This allegation of the bill was in part admitted and in part denied in section 6, paragraph (l) of the Government's answer (R. 136). The issue was argued before the District Court, at pages 314-322 of appellant's opening brief in that court; at pages 143-160 of the Government's brief in the District Court; and at pages 27-28 of appellant's reply brief in the District Court.

This issue is not mentioned in the decision of the District Court. Upon this issue the court made no finding whatever, not even that there was some evidence sustaining the decision of the Secretary. The failure of the District Court to make findings in accordance with the evidence upon this question is assigned as error in assignments of error nos. 83-87, inclusive; it is covered by point no. 15 in our statement of points to be relied upon; and by our proposed findings of fact nos. 21 and 22 (R. 144).

In view of the failure of the District Court to make any findings whatsoever upon this issue, it becomes necessary to present it in substance *de novo.* The real substance of the injury to appellant in this connection is not the application of a half yardage charge on shipments "resold or reweighed for purpose of sale", because appellant is now making and for many years has made a charge of that kind which is approximately equal to that prescribed in the decision of the Secretary.

The charges prescribed by the Secretary differ from those of appellant in only one instance, namely, that the former are 1.5 cents per head lower on calves than the charge now made by appellant. As the number of calves resold is negligible, this difference in rates would not appreciably affect appellant's income.

It will be noted, however, that in paragraph 201 of the Secretary's decision (R. 126), the Secretary estimates that the resale half yardage charge could and would be applied on 75,000 cattle, 5,000 calves, 200,000 hogs, and 2,500 sheep. This would produce revenue from that source, under the prescribed rates, of $25,775, as shown in the table at page 71 of this brief. But this charge could not be applied to more animals than the number to which it was applied in 1932; and its application in that year would have produced revenue of only $4,972.

The error is that the Secretary has plainly overestimated the income from this source by $20,803 (see table, p. 71, this brief). This estimate of $20,803 is treated as additional revenue which would come to appellant under the Secretary's order and is used as a credit against the prescribed reductions in regular yardage charges and feed margins, thereby making the net reduction apparently less than it would actually be.

Appellant's contention is that there is no possibility, even remote, of this additional resale yardage revenue being obtained by appellant because such charges are now being assessed against all shipments upon which they could be assessed under the Secretary's order. In order to present the matter completely at this point, we first quote the present provisions of appellant's tariff with regard to this charge (Government exhibit 101, R. 397, item No. 1):

> "Live stock forwarded or driven to country from yard, without change of ownership or being weighed, yardage will be waived. Live stock resold in commission division, one-half the above rates additional will be collected."

The following statements in connection with this subject are to be found in the Secretary's decision. The first is contained in paragraph 20 (R. 35):

> "20. Dealers or traders and others who have purchased livestock in the stockyard sometimes place it with a 'commission man' to be resold. Such livestock is said to be 'planted' and sometimes it is referred to as 'seconds.' When such livestock is resold, respondent charges to the vendor thereof the one-half rates mentioned in the preceding paragraph. No such charge is scheduled to cover resales made elsewhere than in the 'commission division,' *but in practice respondent does not observe its published tariff in this regard and imposes the one-half charges on resales wheresoever made* if they do not involve livestock 'to go to the country,' that is, purchased by farmers to be fed." (Emphasis ours)

In paragraph 26 of the decision (R. 36), the following statement appears:

> "For the use of these facilities and for these services respondent makes no charge to the trader on livestock sold 'to go to the country' and only a half charge on that sold for other purposes."

The findings and conclusions of the Secretary upon this subject are stated in paragraph 196 (R. 124) which reads as follows:

> "196. The tariff of the respondent provides for a charge on livestock resold in the commission division equal to one-half of that charged upon livestock arriving by rail. The testimony of witnesses for the respondent is to the effect that respondent makes a charge on all resales, except on livestock going to the country, of one-half the original yardage, irrespective of whether resale occurs in the commission division or in other parts of the stockyard. The evidence indicates that respondent is not making charges for resales in accordance with the provisions of its published tariff. The record shows for the years 1931 and 1932 the number of livestock of each species to which a general resale or reweigh charge would apply. The record shows the total number of head of each species

of livestock handled by *dealers* for the years 1931 to 1932 and also the total number of head of each species shipped by *dealers on consignment* to other markets. The difference represents the number upon which a general resale or reweigh charge may be made applicable. For the year 1931 the number of head of livestock to which a reweigh or resale charge would apply was 91,730 head of cattle and calves, 267,730 hogs and 4,059 sheep. The corresponding figures for 1932 were 76,560 cattle, 180,393 hogs and 1,939 sheep. The average of these figures for the two years is 84,154 cattle, 224,061 hogs and 2,999 sheep." (Emphasis ours)

As to the statement in paragraph 196 that appellant was not making the charge for resales in accordance with the provisions of the published tariff, it is apparent from the decision that the Secretary did not intend to say that appellant was charging *less* than it should charge under its published tariff, but he intended to find that, regardless of the language of the tariff, appellant has been charging the half yardage whether the resale was made in the commission division or in some other part of the yards.

In paragraph 201 of the decision (R. 126), the Secretary states his estimate of the number of live stock upon which the half yardage charge would be applied under the caption "Resales." Applying to that estimate the half yardage rates prescribed by the Secretary (the details of this computation appear on page 71 of this brief) shows that the Secretary estimated that appellant would obtain from this charge the sum of $25,775 per annum. In 1932 the actual revenue obtained from this resale or reweigh charge, under the slightly *higher* resale rates maintained by appellant, was $4,972. The details which brought about that total appear in lines 25-29, inclusive, of the tabulation on page 41 of this brief. Thus the Secretary estimated that appellant's revenue would be increased from this charge by $20,803. It should be noted that, in order to

obtain this $4,972, appellant applied this charge not only under the terms of this tariff, that is, to live stock resold in the commission division, but also, contrary to its tariff, to live stock resold in other parts of the yard.

The conclusion reached by the Secretary rests upon a very plain and demonstrable error. The estimated *increase* in resale yardage is predicated upon the assumption that *order buyers* would pay a resale yardage under the erroneous idea that they *are not order buyers but are dealers.* Mr. Bufkin, the Government witness who audited appellant's accounts, introduced figures into the record purporting to show the trading transactions of *dealers* (R. 568, 569, 570). The largest account was that of Corrigan and Symon (R. 570). Bufkin asserted that his figures showed the number of head *resold* by these *dealers* on which no resale yardage was paid (R. 569). In rebuttal, appellant called as a witness Robert G. Symon, resident partner of Corrigan and Symon. Mr. Symon testified that he is not a *dealer* but is a *live stock order buyer.* He testified that he is registered with the Secretary of Agriculture as an *order buyer* and files with the Secretary charges covering his services as an *order buyer* (R. 885). Concerning the year 1932, Mr. Symon testified as follows:

> "I only purchased 166,242 hogs. The bulk of these hogs were shipped on *orders* and the balance were sold in the St. Joseph Stock Yards. We *resold* and reweighed 16,546 hogs at the St. Joseph Stock Yards and *paid the reyardage or half yardage charge applicable to resales on the market.* 1,356 of these hogs were shipped to other markets for sale; that left a balance of 148,340 hogs and *they were all shipped on orders.* I am registered with the Secretary of Agriculture as an *order buyer* and publish with the Secretary charges covering my services as an *order buyer.* In respect to each and every one of the hogs covered by this 148,340 which I shipped on order I charged the published charge for my services as an order buyer. * * * These 148,340 hogs which we shipped on orders in the year 1932 *were not resold* on the St. Joseph market." (R. 885-886) (Emphasis ours).

The testimony of Mr. Symon was undisputed by the Government and no evidence was offered in rebuttal to his testimony.

In paragraph 196 of the decision (R. 124) the Secretary finds that the resale half yardage charge could have been applied in that year to 180,393 hogs. The testimony of Mr. Symon shows that 148,340 of those hogs were not *resold* on the St. Joseph market. Consequently the Secretary erred to that amount, which would have left only 32,053 hogs upon which the resale charge could have been applied in 1932 if the Secretary's estimate had been correct. The resale charge was in fact applied in 1932 upon 25,224 hogs, as shown in line 28 of the table on page 41 of this brief.

It should be noted that the charge prescribed by the Secretary in paragraph 207 of the decision (R. 128) is to be applied upon live stock "*resold* or reweighed for purpose of *sale.*" The testimony of Mr. Symon shows that the 148,340 hogs included by the Secretary in his estimate were not *resold* within the St. Joseph Stock Yards and therefore the charge could not have been imposed upon those hogs.

The Court doubtless knows that the *order buyer* is simply an *agent* at appellant's stockyards of *packers located at other points.* Upon orders received by letter, telegram, telephone, or otherwise, an order buyer, such as Mr. Symon, purchases the required number of hogs or other live stock and ships them to his principal. The transaction is not different from that of the local packer whose buyer goes into the yards and buys live stock for the local packing house, for which only the single yardage charge applies.

In addition to this testimony of Mr. Symon, we have the uncontradicted testimony of Mr. C. F. Topping, appellant's president, (R. 826) to the effect that the resale charge was, at the time of the hearing, being applied to

all live stock resold in appellant's yards. Upon this subject, Mr. Topping testified as follows (R. 826):

> "If a dealer or trader has purchased livestock in the yard, and *resells* it in the yard to another dealer or trader or to a packer or an order buyer or a commission firm, the dealer or trader who *sells* the livestock is required to pay a yardage charge regardless of whether the resale takes place in the commission division or the traders division. * * * The one-half yardage charge is imposed on all livestock *sold* in the stockyards when the actual *sale* is made to another buyer in the yards, except when it is bought to go to the country to feed." (Emphasis ours)

The point we desire to emphasize is that, *if the Secretary's order were now in effect, the record plainly shows that no greater amount could be obtained from this charge than that which has accrued from the transactions to which it has been applied in the past.* There is no suggestion in the Secretary's decision or order that this *resale* charge may be or can be applied against an *order buyer* who purchases live stock for shipment to packers at other cities. The obvious reason is that there is no *resale* at the St. Joseph Stock Yards. The very form of the order denies the possibility of such an application of the charge. It provides that the charge shall be assessed upon animals "*resold* or reweighed for purpose of *sale.*"

The arbitrary effect of the decision in this connection is that, based upon this erroneous application of the *resale* charge, the Secretary *estimates* that under his prescribed rates appellant's gross income would be increased, as applied to 1932, by $20,803 per year, which would be an offset against the *reductions* in yardage and feed. Where the total net operating income to be permitted under the decision is only $192,010, an error of $20,803 in income becomes very important and, added to other errors, results in confiscation.

It might well be contended that the Secretary exceeded his lawful authority even if it were possible to impose the resale yardage charge. It was so held by the District Court in *Denver Union Stock Yards Co.* v. *United States,* 57 F. (2d) 735. The distinction between that case and the present is that in that case the stockyards company apparently was not imposing the resale charge and did not desire to do so, while in the present case appellant imposes the resale charge and has undertaken to collect it upon all live stock *resold* in its yards. Suggesting that this distinction be kept in mind, we quote for convenience certain of the conclusions of the District Court in the *Denver Union Stock Yards Company case* upon this issue (pp. 751-752):

> "When cattle are shipped to the Denver stockyards, they are destined either for the packing house or the feeding pens. It is a matter of no importance that, in the course of that journey, the title passes through a trader. * * * In any event, it seems to us to be well within the power of the petitioner to exact but one yardage charge for the service rendered the shipper, whether or not the title to his cattle passes through the hands of a trader. * * * It occurs to us that the settled and existing policy of the petitioner is sound; but that is not for us to decide. Neither is it for the Secretary; it is a question of business management, confided by the law and the decided cases, to the owners of the property. *We conclude that the Secretary erred in charging against the income of the petitioner a toll which it does not exact, and which the Secretary has no power to require it to exact.*" (Emphasis ours)

It is respectfully submitted that the District Court erred *in failing to make any finding whatsoever upon this important point,* which was squarely in issue under appellant's bill and the Government's answer, which was the subject of testimony on behalf of the Government and of appellant, and of a very substantial amount of argument

in the briefs of both parties in the District Court. A finding upon this point was requested in appellant's "petition for supplemental findings of fact and conclusions of law" (proposed findings nos. 21 and 22 (R. 144)).

X.

THE DISTRICT COURT ERRED IN FAILING TO FIND THAT THE ORDER OF THE SECRETARY WITH RESPECT TO FEED LOT CHARGES WAS VOID.

This point is stated with more elaboration in no. 14 of our statement of points to be relied upon and in assignments of error nos. 78-82, inclusive. Findings were requested in proposed findings of fact nos. 19 and 20. The real point in issue here is that the Secretary *proposed* but did not *prescribe* a vastly increased charge which appellant does not desire and cannot obtain. It is the contention that the finding is void for reasons to be hereafter stated.

Facts relating to feed lot yardage. Certain of the land and structures which the Secretary has found used and useful are devoted to feed lots. The live stock fed there is principally sheep. The nature of this business may be briefly summarized by saying that persons desiring to carry on this business purchase sheep upon arrival at appellant's stockyards; for this they pay the regular full yardage charge. They hold the sheep in the feed lots and when a sufficient amount has been fed the sheep are usually sold in the feed lots. When sold appellant again obtains the full yardage charge. Thus, from this class of business, appellant obtains the full yardage charge when the sheep come to the market, the feed lot charge for the period during which the sheep are in the feed lots, and the full yardage charge when the sheep are again sold after fattening.

In the table below are the rates for feed lot yardage

at present published and charged by appellant, the rates suggested in the order of the Secretary, the amount of the increase in cents per ~~100 pounds~~ and in percentage:

FEED LOT YARDAGE.

	Present	Proposed	Increase
Cattle—			
Where land only is furnished	15¢	60¢	45¢—300%
Where sheds and other enclosures are furnished	35¢	60¢	25¢— 71%
Hogs	5¢	38¢	33¢—660%
Sheep	5¢	38¢	33¢—660%

The Secretary has not prescribed these feed lot charges as a minimum below which appellant may not go. This is admitted in the answer of the Government (R. 136). It is therefore not open to dispute that the Secretary was not here exercising his power to *prescribe* the *minimum* rate for the feed lot service but was simply *suggesting* a higher charge which might be made.

Upon this permissible higher charge was predicated an estimate of increased income to appellant. In paragraph 201 of the decision (R. 126), the Secretary estimates that the feed lot charges prescribed by him would be applied to 5,000 cattle, 1,200 hogs, and 85,000 sheep. This would produce revenue of $35,756 per year. As a matter of fact, in 1932 there were on the feed lots only 2,321 cattle, 1,198 hogs, and 52,358 sheep. Thus at the time of the hearing, if the rates proposed by the Secretary had been applied to the actual number of live stock which used the feed lot facilities, the revenue would have been only $21,743. The Secretary's estimate of the revenue resulting from the rates prescribed by him exceeded the revenue which would have been received by $14,013. Under the rates charged

by appellant the revenue from feed lot operations in 1932 was only $3,320.75. Thus the revenue estimated by the Secretary of $35,756 exceeds by $32,435.25 the amount which appellant could actually obtain. This is merely a fictitious estimate of revenue which it is erroneously estimated could be obtained by appellant in order to mitigate the actual reductions in revenue which would result from the maxima rates prescribed by the Secretary for general yardage and feed charges.

The subject is treated in the decision of the District Court, 11 F. Supp., at pages 337 and 338. It is respectfully submitted, however, that the court did not make the specific findings upon which a conclusion as to the validity of this portion of the Secretary's order must be based. A general discussion of the use of the feed lots and the finding that they are a part of appellant's property used and useful for rate making purposes appears in paragraph 58 of the Secretary's decision (R. 57). Further references to the portions of the property used as feed lots are to be found in paragraphs 64, 70, 77, 82, 85, and 87 of the Secretary's decision (R. 59, 61, 65, 66, 68, 69).

The finding of the Secretary upon which the proposed increase in feed lot charges is based is found in paragraph 206 of his decision (R. 128) and reads as follows:

> "Moreover, under the existing schedule shippers of livestock who consign their animals to commission men are charged more by the respondent for the use of its facilities in handling such livestock for a shorter period of time than are those who use that portion of its facilities hereinbefore referred to as feed lots for a much longer period of time. It is found that the schedule of rates and charges now in effect is unreasonable and unjustly discriminatory."

The Secretary does not intend to find that these charges are unreasonably *high* but that they are unreasonably *low*. The revision of the relative level is based upon a finding of unjust discrimination.

The basis for the contention that the decision is void in so far as it relates to feed lot charges, and the predication thereon of any reduction in yardage charges, may be summarized as follows:

1. THE DECISION OF THE SECRETARY DOES NOT CONTAIN ANY FINDINGS OF A NATURE WHICH SUPPORT THE ORDER.

2. UPON THIS QUESTION, THERE WAS NO HEARING BEFORE THE SECRETARY IN ANY TRUE SENSE.

3. THE EVIDENCE IN THE RECORD DOES NOT SUPPORT THE CONCLUSIONS STATED BY THE SECRETARY.

4. ALTHOUGH THE ORDER WAS BASED UPON A FINDING OF UNJUST DISCRIMINATION, NO ALTERNATIVE WAS PERMITTED TO APPELLANT AS TO THE MANNER OF REMOVING THAT DISCRIMINATION.

We discuss these points in the order stated.

1. *No findings to support the order of the Secretary.* We have quoted above the only finding, if it may be called such, upon which the Secretary predicates the change in feed lot charges and the estimated increase in revenue of $32,435 from that source. It will be noted that the decision does not state—

(a) The value of the feed lots.

(b) Cost of maintaining the feed lots.

(c) Present or probable profit from the feed lots.

(d) The amount which the present users of the feed lots are able or willing to pay.

(e) The benefit to the general revenues of appellant from the maintenance of the feed lots.

In the answer of the Government to the argument presented in appellant's brief upon this point in the District Court, it is evident that a belated effort was made to try to justify the action taken by the Secretary. It was there stated in substance that the area

of the land occupied by the various feed lots is set out in various Government exhibits; that the value of the zones in which the feed lots are located is set out in the order of the Secretary, paragraph 121; that the value of the structures on these feed lots is set out in Government exhibits 114, 114-A, 114-B, and 114-C; and that the feed lot charges prescribed by the Secretary applied to the volume of live stock estimated by him would be sufficient to afford a fair return upon the value of the feed lots. This was evidently an after-thought. None of the facts stated in the brief of the Government in the District Court as to the areas of the feed lots, value of land, value of structures, etc., or any of the expenses in connection therewith, are to be found in the decision of the Secretary. *It is submitted, therefore, that the order is void because of lack of the necessary findings.* This is certainly one of the points where, after reviewing the entire decision of the Secretary as well as the decision of the District Court, this Court would be "left to spell out, to argue, to choose between conflicting inferences." *United States* v. *Chicago, M., St. P. & P. R. Co.*, 294 U. S. 499, 510, 511, 79 L. ed. 1023, 1032.

2. *No hearing in any true sense.* The proposal by the Secretary of tremendously increased charges for the use of the feed lots, upon this record, was plainly an exercise of arbitrary power, at variance with the rudiments of fair play and as such violates the due process of law clause. *Chicago, M. & St. P. R. Co.* v. *Polt*, 232 U. S. 165, 168, 58 L. ed. 554, 555; *West Ohio Gas Co.* v. *Public Utilities Com.*, 294 U. S. 63, 71, 79 L. ed. 761, 769.

The printed record on this appeal contains all of the testimony in connection with the feed lots. *The Court will find therein no testimony relating to any proposed change in the feed lot charges on the part of the Government witnesses or others.* No such question was anticipated

by appellant and therefore it offered no evidence upon that subject. No one interested in this subject, on behalf of the Government, the appellant, or those who use and pay the feed lot charges, had any notice that an increase in such charges was under consideration or contemplated by the Secretary. Nor was such intention on the part of the Secretary indicated in the order of July 19, 1932, under which this proceeding was reopened (R. 394). This situation followed naturally from the course of events stated below.

In the first decision, the feed lots, although used for the same purpose and by practically the same people, were excluded by the Secretary from the value of appellant's property used and useful for rate making purposes (see first decision, pars. 44 and 47-51, inc., appendix to brief, pp. 25 and 27-29).

Upon the second hearing, all of the testimony concerning used and useful property on behalf of the Government was offered by the Government witness, Mr. Christensen. Adhering to the opinion expressed by the Secretary in his first decision, Mr. Christensen testified with respect to the feed lots (R. 403):

> "I think both the land and structures are not used and useful in connection with the rendition of stockyards services for the reason that they are not used as a market for livestock."

In view of the testimony of the Government witness to the effect that the feed lots should be excluded upon the second hearing; the fact that they had been excluded by the Secretary in the first decision; and that no testimony was offered on behalf of the Government with respect to any proposed change in the feed lot charges, it was not assumed that that subject constituted a part of the investigation and, as a consequence, no evidence as to feed lot charges was offered in connection therewith by appel-

lant. The whole theory of the Government on the hearing before the Secretary was that the feed lots should be excluded from the property used and useful for rate making purposes.

In the present decision the Secretary reversed his first decision and included the feed lots and the structures thereon amongst the property used and useful for rate making purposes. But at the same time, without notice or hearing, he proposes to increase the feed lot charges by the amounts above stated which make the increases range from 71 per cent to 660 per cent. Obviously, this action as to the proposed increase in charges was in the nature of surprise, and could not have been anticipated by appellant.

The finding with respect to the feed lots being without any support in the testimony, when the case was before the District Court (apparently as a matter of after-thought) counsel for the Government attempted, out of the numerous exhibits stating areas, etc., to set up a value for the feed lots and to estimate a fair return thereon. *The argument there made, however, was not based upon any findings contained in the decision of the Secretary.*

It is respectfully submitted that, in view of the facts above stated with respect to the feed lot charges, appellant was denied the full hearing and the fair play which are a fundamental part of due process where a schedule of rates is being changed by an administrative tribunal.

3. *The evidence does not support the conclusion that the returns from the feed lots are inadequate for the results which the feed lots were intended to produce.* The court will appreciate that not each piece or square foot of property can be expected to bring in an equal return upon the fair value of the property. Some parts of an operation may have to be conducted at a moderate rate because of their beneficial effect upon other parts. Not each branch line

of a railroad, nor each commodity carried by a railroad, necessarily contributes the same percentage of profit as each other branch or commodity.

The reason for the establishment of the feed lots and the maintenance of the charges which have been made by appellant are fully disclosed in the evidence.

(a) The feed lots were established to increase receipts, particularly of sheep, and they have done so (R. 818). In the first hearing, Mr. J. O. Barkley, then manager of appellant's company, testified that when the sheep feeding was established in 1922, 729,784 head of sheep were received. The number was increased in 1923 to 979,488; in 1924 to 1,088,731; in 1926 to 1,302,746; and in 1928 to 1,579,572 (Government exhibit 111). The reason for the establishment of the facilities and the increase in receipts of sheep was as follows:

Prior to the establishment of the feed lots, appellant did not have a market for what is known as the feeder part of a band of sheep. From the range country, the sheep master likes to ship his entire band, some of which are ready for slaughter and some only for feeding. Such a shipper will send his sheep to the market where there is an outlet for all classes of sheep, old and young, fat and lean. By setting up these feed lot facilities, appellant established an attractive market for all classes of sheep, thus enabling the range master to ship his entire band at one time.

(b) Appellant collects double yardage on animals taken to the feed lots (R. 819, 832, 834). That is to say, the regular yardage charge is collected when the live stock is purchased at appellant's stock yards by the feed lot operator, and the regular yardage charge is again collected when the feed lot operator later sells the live stock usually in the feed lots.

In estimating the revenue from this source, the Secre-

tary has overlooked one necessary deduction. Appellant now obtains its full yardage charge when the sheep at the feed lots are resold. Under the order of the Secretary (par. 207, R. 128) appellant could obtain only a half yardage charge when the live stock in the feed lots is resold. Applying the half yardage charge in paragraph 207 of the decision to the estimated number of head in paragraph 201 of the decision would reduce this yardage revenue by $6,357.

(c) The feed lots constitute, in the main, facilities which were formerly used for other functions, such as the southern cattle division and the horse and mule division (R. 818). Thus the feed lots furnish a useful source of revenue for land and buildings which could no longer function for the purpose to which they had originally been dedicated.

(d) Part of the feed lots are used for the Baby Beef and Pig Club Show (R. 823-25) and the regular yardage is charged upon all animals held in such show. This is included in the regular yardage charge stated in the Government audit (R. 825).

(e) The testimony shows that, if to the direct revenue received under item 12 of appellant's tariff (the feed lot yardage charge) were added the full yardage which accrues when live stock is brought to the market for the feed lots and when it is resold from the feed lots, the feed lot facilities earn a fair return upon their value (R. 848).

(f) From many of appellant's facilities, such as sewers, water pipe, etc., it obtains no direct return. To attempt to establish a system of charges under which each beneficial facility must stand upon its own feet would not only be contrary to the universal practice but contrary to common sense business operations (R. 848).

The evidence shows that the feed lots were established for a sound business purpose, namely, to increase appel-

lant's receipts of sheep; that they have accomplished that purpose; that all of the revenues directly attributable to them result in having the feed lots pay their own way; that no evidence was taken as to whether the feed lot charges might reasonably be increased; that they form a part of appellant's general facilities in connection with "the receiving, buying, or selling on a commission basis or otherwise, marketing, feeding, watering, holding, delivery, shipment, weighing, or handling, in commerce, of livestock." (U. S. C. A. tit. 7, § 201 (b)).

4. *The finding is void because, although based upon a conclusion that the present charges result in unjust discrimination, appellant is offered no alternative as to the removal of the discrimination.* The portion of paragraph 206 (R. 128) of the Secretary's decision heretofore quoted shows that the proposed change in the feed lot yardage is based upon a conclusion that the present charges are unjustly discriminatory. The net result is that the Secretary indulges in an assumption that from this portion of its business appellant will be able to obtain revenue which in 1932 exceeded that actually obtained from the feed lots by $32,435, and that the level of appellant's charges for regular yardage and feed may be reduced by that amount without making any change in appellant's net income.

If this were a fact, appellant was entitled to have an alternative as to the method of removal, so that it might determine whether it could obtain all or any part of the increased revenue suggested by the Secretary and, consequently, *not forego in its general yardage charges any greater amount of revenue than that which it might be able to obtain, if any, from an increase in its feed lot charges.* In denying such an alternative to appellant, the Secretary has committed an error of law which makes the order void.

Section 305 of the *Packers and Stockyards Act, 1921*

(U. S. C. A. tit. 7, § 206) which prohibits any discriminatory rate or charge, is similar in language and purpose to section 3 of the *interstate commerce act* (U. S. C. A. tit. 49, § 3, par. (1)). Each prohibits discrimination. The discrimination section of the *interstate commerce act* has been frequently construed by this court and the same construction is necessarily applicable to the similar provisions of the *Packers and Stockyards Act, 1921. Tagg Bros. & Moorhead* v. *United States*, 280 U. S. 420, 442, 74 L. ed. 524, 536. This Court has definitely held that, where discrimination is found, a real alternative as to its removal must be afforded to the offender.

It was so held in *Skinner & Eddy Corp.* v. *United States*, 249 U. S. 557, 63 L. ed. 772, at page 566, where the Court said:

> "The order prohibiting the unjust discrimination, however, leaves the carrier free to continue the lower rate; the compulsion being that if the low rate is retained, the rate applicable to the locality or article discriminated against must be reduced."

It was again so held in the recent case of *Texas & P. R. Co.* v. *United States*, 289 U. S. 627, 650, 77 L. ed. 1410, 1428, where this Court said:

> "Where an order is made under § 3 an alternative must be afforded. The offender or offenders may abate the discrimination by raising one rate, lowering the other, or altering both."

In the present case no alternative is afforded appellant because *it must publish the reduced general yardage rates* even though it may be unable to obtain a penny of increase from the feed lot yardage.

The order, as stated, prescribes *maxima* rates for yardage and merely authorizes appellant to increase its feed lot charges if it can do so. As a matter of law, if there were of record facts to justify a finding of discrimination, which we deny, the order must necessarily afford appellant an oppor-

tunity to abate the discrimination by increasing one yardage rate, lowering the other, or altering both. Since appellant is denied this right by the Secretary's order, the order is void, because beyond the statutory power of the Secretary.

For the several reasons here presented (1) the lack of findings in the decision; (2) no hearing in any true sense; (3) lack of evidence to support the conclusions stated; (4) because no alternative was afforded to appellant as to removal of the stated discrimination; the decision of the Secretary is void in so far as it deals with the question of feed lot charges. Without the estimate there made of increased revenue to appellant, the remainder of the order in so far as it reduces general yardage and feed charges is obviously void because confiscatory.

XI.

THE DISTRICT COURT ERRED IN FAILING TO FIND THAT THE VALUE OF THE TRANSIT HOUSE SHOULD BE INCLUDED IN THE VALUE OF APPELLANT'S PROPERTY USED AND USEFUL FOR STOCKYARDS PURPOSES.

This point is no. 3 of our statement of points to be relied upon and is based upon assignment of error nos. 6-14, inclusive. As to it appellant sought appropriate findings of fact in its petition for supplemental findings of fact. (R. 142).

In his first decision in this case (par. 64, appendix to brief, p. 34), the Secretary included the Transit House as a part of appellant's property used and useful for stockyards purposes. In the second decision (par. 84, R. 67), the Secretary excluded the value of the Transit House and the land upon which it stands as not used and useful for stockyards purposes.

No change in conditions since first decision. In his first decision, the Secretary found that this property was used and useful. We quote the finding upon that point from paragraph 64 (appendix to brief, p. 34) of the first decision:

> "The building known as the Transit House was erected some years ago and at a time when passenger transportation facilities between South St. Joseph and the hotel area of St. Joseph were not so good as they now are. It appears to have been suited to the then conditions. Since that time patronage has declined and now it is leased to an operator for $100 per month under a contract whereby the operator's books are open to respondent's inspection, and, if the revenues of the hotel business warrant, respondent may increase the rental. The rental so paid falls far short of yielding a fair return upon the fair value of this property, if its fair value be taken to be the cost of reproduction new less depreciation, to say nothing of its proportion of general overheads. Its chief present patronage is by those who drive trucks in which livestock is brought to the stockyards. These are not usually the owners of the livestock but persons engaged in the conduct of public trucking businesses. They come to the stockyard mostly late at night and it is necessary for them to find a place to sleep. They are prohibited by law from parking their trucks in the streets of St. Joseph. Apparently they are unable to or will not pay for the accommodation they receive rates adequate to yield a fair return upon the fair value of the property. They would be satisfied with less costly accommodations were such available. Respondent contends that having this accommodation for the truck drivers tends to induce them to come to its stockyard rather than some other; that the maintenance of this facility is advantageous to the shipper of the livestock, and therefore, that it should be included among the used and useful property. *The hotel, including the* 15,805 *square feet of land which it occupies, is found to be used and useful in the rendition of the services for which are charged the rates the reasonableness of which is determined by this order.*" (Emphasis ours).

At the second hearing Mr. Christensen testified on

behalf of the Government as to used and useful property. The following (R. 418) is his testimony in the second hearing respecting the Transit House:

> "The use of the Transit House is substantially the same as it was in 1929. • • • The Secretary in his prior decision allowed the Transit House as used and useful."

Appellant called as a witness C. F. Topping, its president and general manager, and the following is taken from his testimony on the second hearing (R. 823):

> "The situation is practically the same now as at the time of the previous hearing. I heard the statement of Mr. Christensen that the patrons are chiefly commercial truckers. I investigated this statement and discovered that for the month of November, 1932, I found that 51.6 per cent of the total registrations were actual shippers, and for the month of December the percentage of actual shippers was 68.6 per cent, and for the month of January, 1933, the percentage of actual shippers was 56.6. In my opinion the need for the maintenance of the Transit House by the management of respondent has continued. • • • There has been no change in circumstances and conditions respecting the use of the Transit House since the prior hearing that would have any bearing whatsoever upon the change of classification from used and useful to non-used and useful."

In its decision, 11 F. Supp. at page 328, *the District Court failed to note that the Secretary had, in his first decision, found the Transit House and the necessary land to be used and useful for stockyards purposes.*

The Transit House is just as necessary as it was at any time and even more so since so much of the live stock is arriving by truck. It is immediately adjacent to the stockyards, the truckers arrive during all hours of the late night and early morning, and the Transit House affords them a convenient and cheap place to sleep or rest within a few feet of the place where their trucks are unloaded. Un-

fortunately, the part of St. Joseph lying between the stockyards and the central portion of the city has many resorts which would be unsuitable as resting places for the persons who bring or forward their live stock to the yards. They are prohibited by law from parking their trucks in the streets of St. Joseph, and they are not able to walk to the city in the middle of the night.

It is *used*. It cannot be denied that it is *useful*. The first decision of the Secretary was in accordance with the record. The testimony on behalf of the Secretary at the second hearing showed that conditions respecting the Transit House were unchanged.

Exclusion of Transit House is confiscatory. The exclusion of this property amounts to confiscation to the extent of its value. The total value of the Transit House and of the land upon which it is located, as determined by the Government witness, is to be found in Government exhibit 114 as to structures and in paragraph 118 of the present decision (R. 86), zone 1, as to land. Using those two values, the value of the Transit House and the land is $120,143. The Secretary has held that a fair return is 7 per cent, and that percentage applied to the value just given amounts to $8,410 per annum of which appellant is deprived by the decision of the Secretary and the District Court.

The decision of the Secretary in substance abolishes this property and confiscates it in a very real sense. As was said by the District Court in *Denver Union Stock Yard Co. v. United States*, 57 F. (2d) 735, at page 746:

> "By denying the petitioner a right to earn a return thereon, the Secretary has, as a practical matter, denied the petitioner the right to own them, for it is mathematically certain that, if the petitioner is not permitted to earn a return upon the value of such properties, it cannot afford to keep them. Some one must pay the taxes on these properties, and some one must pay a return upon the investment therein."

Operation of the Transit House is clearly a matter within the business judgment of appellant's management.

As was said in the same decision, at page 748:

> "This is essentially a matter of business management which may not be arbitrarily interfered with. There is nothing in the outlay to suggest dishonest, wasteful, or imprudent expenditure. The right of a public utility corporation honestly and in good faith to carry on its business and direct its affairs must not be wrested from it under the guise of rate making."

In so holding, the District Court was doing no more than to affirm the prior decisions of this Court.

In *Missouri ex rel. S. W. Bell T. Co.* v. *Public Serv. Com.*, 262 U. S. 276, 288, 67 L. ed. 981, 985, this Court said with respect to an amount disallowed as operating expenses of the utility there involved:

> "There is nothing to indicate bad faith. So far as appears, plaintiff in error's board of directors has exercised a proper discretion about this matter requiring business judgment. It must never be forgotten that while the state may regulate, with a view to enforcing reasonable rates and charges, it is not the owner of the property of public utility companies, and is not clothed with the general power of management incident to ownership. The applicable general rule is well expressed in *State Public Utilities Commission ex rel. Springfield* v. *Springfield Gas & E. Co.*, 291 Ill. 209, 234, P. U. R. 1920 C, 640, 125 N. E. 891:
>
> > 'The commission is not the financial manager of the corporation, and it is not empowered to substitute its judgment for that of the directors of the corporation, *nor can it ignore items charged by the utility as operating expenses unless there is an abuse of discretion in that regard by the corporate officers.*' " (Emphasis ours).

To the same effect are the following decisions in the lower federal courts:

Mobile Gas Co. v. *Patterson*, 293 Fed. 208, 226.

Consolidated Gas Co. of New York v. *Newton*, 267 Fed. 231, 255.

Northwestern Bell Telephone Co. v. *Spillman*, 6 F. (2d) 663, 665.

Citizens' Gas Co. v. *Public Service Commission*, 8 F. (2d) 632, 634.

Pacific Telephone & Telegraph Co. v. *Whitcomb*, 12 F. (2d) 279, 285.

Brooklyn Borough Gas Co. v. *Prendergast*, 16 F. (2d) 615, 623.

Denver Union Stock Yards Co. v. *United States*, 57 F. (2d) 735, 753.

It is respectfully submitted that the decision of the District Court with respect to the exclusion of the Transit House and the necessary land is (1) unsupported by and contrary to the evidence of record; (2) arbitrary; (3) confiscatory of appellant's property in violation of the fifth amendment to the Constitution; and (4) an invasion of the power of management incident to ownership, not authorized by the statute.

XII.

THE DISTRICT COURT ERRED IN FAILING TO FIND THAT APPELLANT'S PROPERTY, USED AND USEFUL FOR STOCKYARDS PURPOSES, HAS A SUBSTANTIAL GOING CONCERN VALUE, IN ADDITION TO THE BARE VALUE OF THE LAND AND STRUCTURES.

This is covered by point no. 6 of our points to be relied upon and assignments of error nos. 20-24, inclusive. Specific findings were asked of the District Court in appellant's petition for supplemental findings of fact, paragraphs 7-9 (R. 143).

The leading decisions of this Court upon this subject are listed below:

Knoxville v. *Knoxville Water Co.*, 212 U. S. 1, 53 L. ed. 371.

Omaha v. *Omaha Water Co.*, 218 U. S. 180, 54 L. ed. 991.

Des Moines Gas Co. v. *Des Moines*, 238 U. S. 153, 59 L. ed. 1244.

Denver v. *Denver Union Water Co.*, 246 U. S. 178, 62 L. ed. 649.

Lincoln Gas & E. L. Co. v. *Lincoln*, 250 U. S. 256, 63 L. ed. 968.

Galveston Electric Co. v. *Galveston*, 258 U. S. 388, 66 L. ed. 678.

Bluefield W. W. & Improv. Co. v. *Public Service Com.*, 262 U. S. 679, 67 L. ed. 1176.

McCardle v. *Indianapolis Water Co.*, 272 U. S. 400, 71 L. ed. 316.

Los Angeles G. & E. Corp. v. *Railroad Com.*, 289 U. S. 287, 77 L. ed. 1180.

Dayton P. & L. Co. v. *Public Utilities Commission*, 292 U. S. 290, 78 L. ed. 1267.

Columbus Gas & Fuel Co. v. *Public Util. Com.*, 292 U. S. 398, 78 L. ed. 1327.

The oft-repeated declaration of this Court as to going concern value is found in *Los Angeles G. & E. Corp.* v. *Railroad Com., supra*, 289 U. S. at page 313, 77 L. ed. at page 1196, and is as follows:

> "This court has declared it to be self-evident 'that there is an element of value in an assembled and established plant, doing business and earning money, over one not thus advanced,' and that this element of value is 'a property right' which should be considered 'in determining the value of the property upon which the owner has a right to make a fair return.' "

The same principle has been followed in many decisions of the lower federal courts and in the highest courts of the states. Amongst those which may be cited in the lower federal courts are the following:

Spring Val. Waterworks v. *City, etc., of San Francisco*, 124 Fed. 574.

Missouri, K. & T. Ry. Co. v. *Love,* 177 Fed. 493.
Des Moines Water Co. v. *City of Des Moines,* 192 Fed. 193.
C. H. Venner Co. v. *Urbana Waterworks,* 174 Fed. 348.
Des Moines Gas Co. v. *City of Des Moines,* 199 Fed. 204.
Goldfield Consol. Water Co. v. *Public Service Com'n.,* 236 Fed. 979.
Pacific G. & E. Co. v. *City and County of San Francisco,* 273 Fed. 937.
City of Minneapolis v. *Rand,* 285 Fed. 818.
Mobile Gas Co. v. *Patterson,* 293 Fed. 208.
Streator Aqueduct Co. v. *Smith,* 295 Fed. 385.
Westinghouse Electric & Mfg. Co. v. *Denver Tramway Co.,* 3 F. (2d) 285.
Southern Bell Tel. & Tel. Co. v. *Railroad Com'n of S. C.,* 5 F. (2d) 77.
Consolidated Gas Co. of New York v. *Prendergast,* 6 F. (2d) 243.
Kings County Lighting Co. v *Prendergast,* 7 F. (2d) 192.
Brooklyn Union Gas Co. v. *Prendergast,* 7 F. (2d) 628.
Citizens' Gas Co. v. *Public Service Commission,* 8 F. (2d) 632.
New York & Richmond Gas Co. v. *Prendergast,* 10 F. (2d) 167.
Middlesex Water Co. v. *Board of Public Utility Com'rs.,* 10 F. (2d) 519.
Monroe Gaslight & Fuel Co. v. *Michigan Public Utilities Com'n.,* 11 F. (2d) 319.
Pacific Telephone & Telegraph Co. v. *Whitcomb,* 12 F. (2d) 279.
United Fuel Gas Co. v. *Public Service Commission,* 14 F. (2d) 209.

Brooklyn Borough Gas Co. v. *Prendergast,* 16 F. (2d) 615.

Columbus Gas & Fuel Co. v. *City of Columbus,* 17 F. (2d) 630.

Idaho Power Co. v. *Thompson,* 19 F. (2d) 547.

Kansas City Southern Ry. Co. v. *United States,* 19 F. (2d) 591.

Board of Public Utility Com'rs. v. *Elizabethtown Water Co.,* 43 F. (2d) 478.

Denver Union Stock Yard Co. v. *United States,* 57 F. (2d) 735.

St. Joseph Stock Yards Co. v. *United States,* 58 F. (2d) 290 (footnote, p. 295).

International Ry. Co. v. *Prendergast,* 1 F. Supp. 623.

Wichita Gas Co. v. *Public Service Commission,* 2 F. Supp. 792.

Wichita Gas Co. v. *Public Service Commission,* 3 F. Supp. 722.

Pacific Gas & Electric Co. v. *Railroad Commission,* 5 F. Supp. 878.

FACTS RELATING TO APPELLANT'S GOING CONCERN VALUE.

In the first decision of the Secretary in this case (pars. 92-96, inc., appendix to brief, pp. 46-50), the Secretary found that appellant had at that time a going concern value of $300,000. *This fact is not mentioned in the second decision of the Secretary or in the decision of the District Court,* 11 F. Supp. 322, in the discussion at pages 334-335, under the title "(6) Exclusion of going concern value."

In the present decision, *with no change in conditions except a somewhat lower valuation of land and structures than that made in the first decision,* the Secretary excludes any allowance for going concern value. This exclusion by the Secretary, and the approval thereof by the District

Court, is alleged by appellant to be contrary to the evidence, arbitrary, confiscatory, and to result in making the order void.

Value fixed by Secretary in second decision includes nothing more than bare bones of the property. In *Los Angeles G. & E. Corp.* v. *Railroad Com., supra,* this court said (289 U. S. at pp. 313, 314, 77 L. ed. at p. 1197):

> "The concept of going value is not to be used to escape the just exercise of the regulatory power in fixing rates, and, *on the other hand, that authority is not entitled to treat a living organism as nothing more than bare bones.*" (Emphasis ours.)

It is readily demonstrable in this case that the Secretary allowed nothing more than the bare bones of the property. The Secretary was plainly in error in the statement (par. 160, R. 112):

> "Thus, in the rate base herein found, there is included a large amount for going-concern value * * *."

The values determined by the Secretary are those set up by the Government engineer, Mr. Henrici, in Government exhibit 114 (R. 424). Mr. Henrici appraised the value of all of appellant's structures. From this value, the Secretary deducted the values found by Mr. Henrici for certain structures which the Secretary declared were not used and useful. The cost of reproduction new for labor and materials only are shown at the end of paragraph 126 of the present decision (R. 92). To such labor and material costs are to be added the construction overheads set forth in paragraph 136 of the present decision (R. 99). The total value determined by the Secretary is merely the addition of the depreciated value of structures, land value, and working capital. (See par. 161 of decision, R. 112, 113).

To this cost of reproduction new, the Secretary applied a percentage of 76.04 to obtain the cost of reproduction new less depreciation of $2,039,616 appearing in paragraph

148 (R. 106) of the decision. This percentage was likewise the percentage taken from the testimony of Mr. Henrici, the Government engineer, as applied to the structures which the Secretary found to be used and useful.

We now turn to the record for the purpose of demonstrating that this appraisal made by the Government engineer covered nothing more than "the bare bones of the structures" *with such overheads as would necessarily be incurred in connection with the construction.* It included no item which would accrue because of the effort, time, and money spent for the purpose of establishing and attaching the business or which represents the value of a "plant, doing business and earning money, over one not thus advanced." The quotations given below are from the testimony of Mr. Henrici, the Government Engineer, as they appear in the abstract of the record of the rehearing at St. Joseph, Mo., January 10 to February 16, 1933.

> *"The general methods of appraising the property were the same I used in making the original appraisal* which is Government Exhibit Nos. 4-E to 4-I, inclusive, *and as described in the abstract of record of my testimony in the former hearing."* (R. 422.)
>
> "To the *bare cost of material and labor* I added certain percentages which are known as *construction overheads.* These are the overheads which would commonly be incurred by a contractor in building a property. To the total of material and labor plus construction overheads I added an item of 5 per cent for contingencies and omissions and obtained a total. To this total was added for architects' and engineers' fee 5 per cent, legal expenses 1 per cent, general salaries and expenses during construction 2 per cent, liability insurance 6.1 per cent of the labor only, fire insurance ½ per cent; the actual taxes paid during 1932 for the year 1932, interest during construction at the rate of 7 per cent for 6 months, being half of the construction period. This gave a total to which were added additions and betterments from 1927 to 1932. That gave a final total, exclusive of land." (R. 426)

"One of the things that omissions and contingencies are to cover is things omitted from the inventory in spite of care." (R. 426)

"Contingencies are akin to omissions in that they cover the general error that creeps into estimates which have not been taken care of altogether in the estimates."

"Those are the things that are ordinarily contained in contingencies."

"This 5 per cent comes from my own experience in rechecking inventories." (R. 427)

"The general overheads stated in Government Exhibit No. 114 are the same type of overheads used in my appraisals of 1927 and 1929." (R. 428)

"My appraisal is not a valuation based on a trend in prices, or average prices, prevailing over a period of years. My appraisal was made by investigation of prices current at the time the appraisal was made. It represents my opinion of the fair and true cost of reproducing this property as of August 1, 1932." (R. 435)

"My overheads do not include any going concern value separately set out."

"There is not any specific item in my appraisal which covers going concern value." (R. 436)

"I stated that I made no separate and distinct allowance in my appraisal for going concern value. It is possible that an article of property could have a cost which might be either greater or less than its value. Cost and value are not necessarily synonyms. In my appraisal I was technically seeking to obtain costs. *My figures attempt to set up my opinion of the value of reproduction cost of property and the reproduction cost less depreciation. I do not attempt to set up market value for the property."* (R. 439)

"There is no difference in the mechanical operation of finding the cost of reproduction new of a property that has a business and the identical property that has no business. The same is true of cost of reproduction less depreciation. I followed the same methods and principles in this appraisal as I followed in my 1929 appraisal." (R. 440) (Emphasis ours)

The sum total of these items, according to the testimony of Mr. Henrici, is set up in exactly the same manner as in the appraisal considered in the first decision, in which the Secretary found that appellant had, in addition to the value represented by the mere construction costs less depreciation, plus the value of land, a going concern value of $300,000. As stated by Mr. Henrici, his overheads did not include any going concern value. There is no specific item in his appraisal which covers going concern value. Mr. Henrici stated specifically that there was no difference between his method of finding cost of reproduction new, and less depreciation, of a property "that has a business and the identical property that has no business." Mr. Henrici's values were adopted by the Secretary.

No additional allowance of 15 per cent or any other to cover going concern value was allowed in this case as in the case of *Des Moines Gas Co.* v. *Des Moines,* 238 U. S. 153, 59 L. ed. 1244.

The same thing is true of land. In the first decision (par. 73, appendix to brief, p. 38), the Secretary stated that the land appraisers, in the values placed upon zone A, the largest and most valuable of appellant's land, had included certain elements of going concern value, wherefore the Secretary reduced the value stated by the appraisers to 25 cents per square foot, thereby eliminating going concern value. In the present decision (par. 110, R. 83), the Secretary reduced the value of that land to 16 cents per square foot, a reduction of 36 per cent from the former value. Certainly it could not be contended that any element of going concern value was included in the land.

Thus the Secretary, contrary to the decision of this Court in *Los Angeles G. & E. Corp.* v. *Railroad Com., supra,* has treated "a living organism as nothing more than bare bones."

The statement in paragraph 160 of the decision (R. 112) that "in the rate base herein found, there is included a large amount for going-concern value" finds no confirmation in the record; is directly contrary to the evidence of witness Henrici, whose appraisal the Secretary adopted; is contrary to the "indisputable character of the evidence", and therefore void.

The District Court erred in its statement that "the only evidence as to this element of value was by witness Howson (for petitioner);" 11 F. Supp. at page 335. The Secretary made a similar error (par. 153, R. 107) in this statement: "Respondent's claim in this respect is based entirely upon the testimony of the witness Howson * * *." There is twofold proof of this error on the part of the Secretary and of the District Court.

1. Following the first decision of the Secretary, appellant filed a petition in the District Court of the United States for the Western District of Missouri, St. Joseph Division, which resulted in the decision in *St. Joseph Stock Yards Co.* v. *United States,* 58 F. (2d) 290. In said petition, appellant made a specific allegation concerning the allowance for going concern value. We have copied that allegation at page 67 of the appendix to the brief. There was a specific answer to that allegation by the United States and the Secretary which is also printed at page 68 of the appendix, admitting that the Secretary had allowed $300,000 for going concern value. The answer continued "but *deny that no evidence with respect to the going-concern value of petitioner's property was offered on behalf of said Secretary at the hearing described in said petition; and allege that much evidence tending to show the going concern value of petitioner's property and business was introduced on behalf of said Secretary at said hearing.* Defendants further deny that the only evidence offered at said

hearing with respect to the going concern value of petitioner's property was that offered on behalf of petitioner." (Emphasis ours.)

By the order reopening this case for the second hearing it was specifically provided (R. 396) that the record heretofore made in this docket, together with all the evidence at said hearing, should constitute the record before the Secretary of Agriculture in this proceeding. Consequently, all the evidence concerning going concern value alleged by appellees to be in the record before the Secretary on the first hearing was before the Secretary on the second hearing. All of that evidence is now before this Court, the evidence on the first hearing covering pages 183-393 of the record. Consequently, it is plainly error for the Secretary to state in the second decision, and for the District Court to find in its opinion, that the only evidence as to this element of value was by witness Howson for petitioner (appellant).

2. The first stockyards was opened at South St. Joseph on December 1, 1887 (R. 637). It was somewhat changed in location and substantially enlarged by the present company between 1898 and 1900 and continued its growth since that time (R. 626). It was placed between Omaha and Kansas City, where there were already much larger and older stockyards. It had to enter into determined competition for its business and to continue that competition throughout its existence.

A glance at the map will show that shippers of live stock at any substantial distance west of the Missouri River can with equal facility send their consignments to Sioux City, Omaha, Kansas City, or St. Joseph. If such shippers think there are better prospects farther to the east, they can and do, in tremendous volume, forward their shipments through the Missouri

River cities on to the terminal live stock markets at Chicago, the largest live stock market in the country, or to East St. Louis. Thus, the market at St. Joseph must compete for receipts not only with the other live stock markets on the Missouri River but also with the more easterly markets, such as Chicago and East St. Louis.

Added to such competition, in recent years there has been a tremendous increase in the practice known as direct marketing; that is, the buying of live stock by packers or other purchasers at country points or on farms or ranches. Mr. C. F. Topping, appellant's president, testified to this effect (R. 825). Mr. Topping pointed out that the packers are now buying from the producers at small concentration points or yards and that this buying diverts live stock which might otherwise come to the St. Joseph market; that his company feels the competition of this direct buying and that it is coming closer to St. Joseph. Consequently, this live stock market must meet the competition not only of other large live stock markets but also the competition which has arisen from the practice of direct purchases of live stock from the country station, farm, or ranch.

In another manner the evidence also shows the highly competitive conditions which have to be met by appellant. The record shows that 40 per cent of the live stock receipts at the St. Joseph market come from a distance within a radius of 100 miles from St. Joseph; 25 per cent from a distance within 100 to 350 miles from St. Joseph; and 35 per cent from beyond 350 miles from St. Joseph (R. 281, 377). This indicates that 60 per cent of the receipts at St. Joseph come from highly competitive territory, for any shipper beyond 100 miles of St. Joseph may readily select four or five other major markets as the destination of his live stock, as well as any of the country buying points.

In addition to this evidence, Government exhibit 111, from which receipts have been quoted above, indicates that it took 30 years to bring cattle receipts from 39,244 head in 1893 to 607,829 head in 1923; the same amount of time to bring the hog receipts from 240,160 head in 1893 to 2,456,962 head in 1923; and 36 years to bring the sheep receipts from 26,230 head in 1893 to 1,635,607 head in 1929. Thus, the record definitely proves that there is here no monopoly of business, a point frequently mentioned in connection with public utility rate cases dealing with telephone, electric light, gas, and now to a lesser degree street railway services. This case presents an outstanding example of an industry which has attached a business, under highly competitive conditions, by efforts continued over a period of 30 to 36 years. The entire record negatives the suggestion that the burden of building up the patronage may have been negligible because of little competition with other markets.

The evidence to which we have called attention was offered at the first hearing. *Thus, both by the answer of the Secretary in the earlier litigation and by the record itself, we have demonstrated that there was substantial evidence relating to going concern value.* Of course, there was much other evidence, all of which cannot be summarized at this point.

The District Court erred in finding that certain elements of going concern value were included in the appraisal. In its discussion of this point (11 F. Supp. at page 335), the District Court said:

> "Moreover, at least some of the elements considered by Howson seem to have been included in the valuation by the Secretary (see finding 136, which includes such items as interest during construction ($125,106) and taxes during construction ($18,257); possibly, also, insurance during construction ($10,618, $46, and $485))."

This statement is plainly erroneous as to the elements considered by Howson.

As we understand going concern value, these costs incurred during construction are not a part of it. Going concern value represents the difference between the value of a plant that has been *completed,* but has *no business attached,* and a similar plant that has been operated for a number of years and has an attached business. This is the definition given by the Secretary in paragraph 159 of the present decision (R. 111) and quoted by the District Court. The testimony heretofore quoted from Mr. Henrici, the Government engineer, definitely shows that *the overheads to which the District Court adverts were merely such overheads as would be incurred during construction and such costs would necessarily have been paid at the time when the plant was completed and ready to do business.* In the quoted portion of Mr. Henrici's testimony they are said to be the same overheads used in his earlier appraisal at the first hearing and in connection with which the Secretary found that appellant had a going concern value of $300,000.

The District Court erred in its apparent approval (11 *F. Supp. at page* 334) *of the following statement taken from paragraph* 159 (*R.* 111) *of the decision*:

> "In actuality, going-concern value is conceived to be the difference between the present fair value of the physical properties of a business, plus its working capital, and its actual net earnings capitalized at the going rate of money. The use of such a measure in rate proceedings would have the effect of destroying the result of the elaborate procedure which is undertaken to avoid using capitalized income as a basis for determination of the reasonableness of that income. *This is why a separate allowance for the element of going concern has no place in valuation for rate making purposes.*" (Emphasis ours).

This reasoning cannot be applied to a public utility whose value is fixed by determining the current value of the land and cost of reproduction new less depreciation of the structures, plus working capital. It could only apply if a business were in a position to capitalize uncontrolled earnings. This point should be very obvious.

This mental concept of going concern value does not depend upon capitalizing income to determine the value of the plant. On the contrary, it depends only upon fixing the value of the plant in the customary way, by competent appraisals, and then attempting in some fair way to determine the difference in value between the plant with the fairly assured income and the plant which [illegible] as before it the necessity of gaining a business which would fairly demand the capacity of the plant. Such a method of determining going concern value would not have "the effect of destroying the result of the elaborate procedure which is undertaken to avoid using capitalized income as a basis for determination of the reasonableness of that income." No such difficulty can possibly arise where both the value and the fair rate of return are determined without capitalizing income in any respect.

The difficulty involved in appraising going concern value does not excuse the regulatory authority from making a proper allowance. We submit that the Secretary and the District Court alike erred in the apparent conclusion that going concern value could be disallowed because of the difficulty of determining the amount. (See first sentence, third paragraph of decision of District Court, 11 F. Supp., 322, at page 334.) The difficulty is perhaps no greater than that which faces the average jury in a personal injury case and yet the jury reaches a verdict. A jury could not be heard to say that it would award no damages in a proper case merely because of difficulty in determining the proper

amount. This point has been discussed in a number of decisions of the lower federal courts. We here refer to merely a few of them.

"In the absence of demonstration through an actual purchase and sale transaction, under fair conditions, its ascertainment must be a matter of competent business judgment as to what a purchaser would be willing to pay for such elements and properties, rather than undergo the costs of acquiring them anew. It is the common necessity and practice, in the business world, to make estimates of the present worth of intangible properties which are no less difficult than any estimate in this case. The courts often have to make such ascertainments, as best they can, from all of the evidence, when dispute arises." *New York & Richmond Gas Co.* v. *Prendergast,* 10 F. (2d) 167, 179.

"This additional value, over and above the fair and reasonable value of the physical properties plus the working capital, which a customer would pay for the property because it is a going concern and which additional value we call 'going value,' does not depend upon past losses in operations, successfully survived, or in expenditures, wise or unwise, during development. There may be such a thing as expenditures wisely made, contributing to 'going value,' but they are not the measure of the amount of 'going value.'" *Pacific Telephone & Telegraph Co.* v. *Whitcomb,* 12 F. (2d) 279, 284.

"There may be businesses in which it is possible to compute with some degree of accuracy this element of value; but, even if accurate computation is not possible, *a value which actually exists should not be ignored because of the difficulty of its measurement.* There is no rule by which the value of a leg or an arm can be accurately measured in dollars and cents, nor by which pain and suffering can be computed; yet triers of fact do evaluate such things. *By the same token, difficulty of measurement should not amount to a denial of right." Denver Union Stock Yard Co. v. United States,* 57 F. (2d) 735, 744. (Emphasis ours)

"That such a value exists is acknowledged by all engineers and appraisers, and is a matter of common knowledge. *That allowance therefor cannot be denied*

because of difficulty in evaluation is settled by decisions of the Supreme Court of the United States and of the Supreme Court of Kansas.'' Wichita Gas Co. v. *Public Service Commission,* 2 F. Supp. 792, 806. (Emphasis ours)

The testimony of Mr. Howson for appellant, except as to the existence of going concern value, may be disregarded. The Secretary was not bound to accept the conclusion of an expert witness as to the amount, although it may be suggested here that Mr. Howson presented a rational method of determining an intangible value. But the Secretary, in his first decision (pars. 92-96, appendix to brief, pp. 46-50), *entirely discarded Howson's method of determining the amount of going concern value, yet upon other facts of record now before this court, found that appellant had a going concern value of* $300,000.

In the *Denver Stock Yard case,* docket No. 301 (see appendix to brief, pp. 69-71) *the Secretary discarded the Howson method of determining the amount of going concern value, but found that stockyards had a going concern value of* $295,000.

In the *Omaha Stock Yards case,* docket No. 344 (appendix to brief, pp. 72-74) *the Secretary completely discarded the evidence of the two experts, Heider and Howson, as to the amount of going concern value, but determined that stockyards had a going concern value of* $850,000.

In view of the unquestioned ability of the Secretary to determine the amount of going concern value in the Denver and Omaha cases; of his ability to determine appellant's going concern value upon the first hearing; and of the holding of the lower federal courts to the effect that the allowance cannot be denied because of difficulty of evalution; it follows that the Secretary and the District Court erred in holding that going concern value could be denied, amongst other reasons, because of the difficulty of determining the amount of such value.

The finding is arbitrary and, therefore, void. This Court will appreciate, without studying the decisions in the several cases here mentioned, that the business conducted at each of the major public stockyards is substantially similar and that the facilities used at these stockyards are substantially the same. If any substantiation of this statement is necessary, we need only refer to the decisions of the Secretary describing the stockyard operations and facilities in the cases cited below.

On July 28, 1931, the Secretary issued a decision and order in the proceeding known before him as B. A. I. docket No. 301, *Secretary of Agriculture* v. *Denver Union Stock Yard Company.* This is the decision which was before the District Court in *Denver Union Stock Yard Co.* v. *United States,* 57 F. (2d) 735. The appraisal of the property of the Denver Union Stock Yard was made by the same Government engineer, Mr. Henrici, and in the same manner as was the appraisal of appellant's property. In the *Denver case* the Secretary found that the Denver Union Stock Yard had a going value of $295,000 or approximately 10 per cent of the land and structural values. The decision of the Secretary upon this point appears at pages 69-71 of our appendix to this brief.

On July 20, 1931, the Secretary of Agriculture issued his first decision in this proceeding, which was before the district court in *St. Joseph Stock Yards Co.* v. *United States,* 58 F. (2d) 290. The Secretary there found that appellant's property had a going concern value of $300,000 (see first decision, pars. 92-96, appendix to brief, pp. 46-50). As indicated in the footnote at page 295 of the District Court decision, a majority of the court was of the opinion that the Secretary had made an insufficient allowance for going concern value.

On March 1, 1933, the Secretary of Agriculture issued his decision in the proceeding known as B. A. I. docket No.

344, *Secretary of Agriculture* v. *Union Stock Yards Company of Omaha, Ltd.* The valuation of the structures in that case was made by the same Government engineer, Mr. Henrici, using the same methods as he had used in the Denver and St. Joseph cases. The Secretary there found that the Omaha Stock Yards had a going concern value of $850,000 (appendix to brief, pp. 72-74). This is the case which was before the District Court in *Union Stock Yards Co. of Omaha* v. *United States,* 9 F. Supp. 864.

It is respectfully submitted that, in view of the findings heretofore made, the present finding of the Secretary to the effect that appellant's property has no going concern value, beyond the bare bones of the structures and land, is arbitrary in the legal sense. It will have been noted that in July, 1931, appellant's property had a going concern value of $300,000, while in May, 1934, according to the Secretary's decision, the property has no going concern value, although *it is the same property, engaged in the same business,* and *the Secretary finds that it has an attached business on which it is making an excessive total return.* There has been no change in the conditions with respect to this element of value since the first decision unless it may be that the amount might be reduced somewhat because of the lower value placed by the Secretary upon the property and the smaller net return prescribed. The items of property value were determined in exactly the same manner, although they are different in amount.

Appellant still has an established business. If it had a going concern value in 1931, as the Secretary found, it has not lost that going concern value in 1934. The finding of the Secretary in the second decision is directly contrary to the facts and evidence to which we have called attention. Under the decisions of this Court, it is void because (1) made without evidence; (2) contrary to the indisputable character of the evidence; (3) no facts or cir-

cumstances are shown to have intervened between 1931 and 1934 which would have resulted in elimination of the going concern value found by the Secretary to exist at the time of the first hearing; (4) arbitrary; (5) confiscatory; and (6) deprives appellant of its property rights under the fifth amendment.

THIS CASE IS READILY DISTINGUISHED FROM DAYTON P. & L. CO. V. PUBLIC UTILITIES COMMISSION, 292 U. S. 290, 78 L. ED. 1267, AND COLUMBUS GAS & FUEL CO. V. PUBLIC UTIL. COM., 292 U. S. 398, 78 L. ED. 1327.

We refer, first, to the decision of this Court in *Los Angeles G. & E. Corp.* v. *Railroad Com.*, 289 U. S. 287, 77 L. ed. 1180. We do not consider that decision as denying but, on the other hand, as affirming the right to an appropriate allowance for going concern value. As we read that decision, it amounts merely to holding that, while the California Commission had not tagged or earmarked a certain amount of money as *going concern value,* a substantial amount had been allowed which could be applied to that element.

We quote the following portion of that decision appearing at 289 U. S. 317, 77 L. ed. 1199:

> "As the historical cost of the far greater part of the fixed property appears to have been taken *at price levels which were higher than those which have obtained in the period to which the prescribed rates are applicable,* and cannot fairly be said to underestimate the value of the plant as of that period, *this excess amount of over* $5,500,000 *can appropriately be assigned to elements of value which may not have been fully covered.* The record affords no adequate basis for criticising the allowance made by the Commission for materials and supplies and working capital, *and thus the entire excess may be regarded as applicable to whatever intangible value the property had as a going concern. The fact that this margin in the rate base was not described as going value is unimportant, if the rate base was in fact large enough to embrace that element.* (Emphasis ours).

Unlike the Dayton Power & Light Company, appellant is not a new company. Appellant's predecessor opened its stockyards at this site in 1887. Appellant's business was slowly and laboriously built up under highly competitive conditions.

No allowance was made in the Secretary's decision for the cost of developing new business.

No allowance was made because of an appraisal of the physical assets as part of an assembled whole. (See *Columbus Gas & Fuel Co.* v. *Public Util. Com.*, 292 U. S. 398, at page 411, 78 L. ed. 1327, at page 1335.) The appraisal here would have been exactly the same if the properties had been in ten disconnected parts at ten different points.

We have demonstrated that the appraisal covered only the "bare bones of the plant" contrary to the decision in the *Los Angeles case.* Furthermore, the value of these "bare bones" was written down to a depreciated condition slightly less than that fixed by the Government engineer.

No historical cost higher than values current at the time of the hearing was allowed by the Secretary. *The property was valued at the bottom of the depression (as of 1932).*

The appraisal was made in exactly the same manner as in the Denver and Omaha cases and the first decision in this case.

The *Dayton Power & Light Company case* and the *Columbus Gas & Fuel Company case,* both of which came from Ohio, appear to have originated under statutes which prohibited an appraisal of going concern value. (See *Columbus Gas & Fuel Co.* v. *Public Utilities Commission,* 187 N. E. 7, at pages 13 and 14.)

We revert again to the comments on the subject of going concern value in the *Los Angeles case,* which we understand were not reversed by the later decisions in the *Day-*

ton Power & Light Company case and the *Columbus Gas & Fuel Company case.*

(1) Appellant is seeking no allowance for good will and made no effort to estimate any such value.

(2) Appellant is not attempting, under the guise of going concern value, to recoup any past losses or any losses during the period of its early development, or to balance any past deficits.

(3) The item is not being used "to escape the just exercise of the regulatory power in fixing rates."

(4) But, to borrow the language of this court in the *Los Angeles case,* we do contend that the regulating authority "is not entitled to treat a living organism as nothing more than bare bones."

Conclusion upon going concern value. Upon the trial of appellant's petition for an injunction against the first decision, the Secretary asserted that the record before him *contained much evidence offered by the Government witnesses upon which he was able to determine that appellant had a going concern value* of $300,000 (appendix to brief, p. 68). All of the same evidence was before the Secretary on the second decision; it was before the District Court; and it is now before this Court. In the present decision, the Secretary *omits to state that upon the first hearing he was able to determine the going concern value of appellant's business and had much evidence upon that point;* nor is that mentioned in the decision of the District Court. The decision upon the second hearing is simply a reversal of the first decision without any rational explanation and is, therefore, arbitrary.

The only difference which could be found between the facts of record upon the first decision and the present decision is because of the lower values determined by the Secretary and the lower net income prescribed. In the

first decision (par. 119, appendix to brief, p. 59), the Secretary held that appellant was entitled to an annual net operating income of $253,661. In the second decision, he holds it to be entitled to a net operating income of $192,010. As between the bare bones of a plant structure and a going business, it is quite possible that a buyer might pay more for the business with a permissible income of $253,661 than for one with a permissible income of $192,010. But such a consideration would involve only a reduction of the amount of going value in the second decision, not its elimination. In the first decision, the amount of going concern value determined by the Secretary was approximately 10 per cent of the other values, that is, land, structures, and working capital. Upon the same basis, under the second decision, the going value would be approximately $274,300.

It is respectfully submitted that the decision should be reversed because of the error of the District Court in failing to require a proper allowance for the element of going concern value.

XIII.

THE DISTRICT COURT ERRED IN FAILING TO FIND THAT THE COST OF REPRODUCTION NEW OF APPELLANT'S STRUCTURES, LESS DEPRECIATION, AS DETERMINED BY THE SECRETARY, WAS NOT SUPPORTED BY ANY LEGAL EVIDENCE.

This point is covered by no. 5 of the statement of points to be relied upon (R. 939); by assignments of error nos. 17, 18, and 19 (R. 153); and a finding thereon was requested in appellant's "petition for supplemental findings" (R. 143, 145).

The District Court seems not to have apprehended the point made by appellant in that court. The subject is discussed in one short paragraph on page 333 of the decision (11 F. Supp. 322) under the title "(4) Value of Struc-

tures." The District Court, after merely stating the percentage used by the Government, concludes:

> "Certainly this was a matter of judgment, and it is not clearly shown that the results reached by the Secretary are erroneous."

The point made in the District Court was that *there was no legal evidence to support the finding of the Secretary* that 76.04 per cent represented the depreciated value of the structures. Upon this point, the District Court failed to pass or make any finding. We quote the following from our argument upon this point at page 141 of our brief in the District Court:

> "The Government called no witness who had examined the property in order to determine the amount of existing depreciation, commonly reduced to a condition per cent. Henrici's testimony was only hearsay as we shall show."

Our argument upon that point concluded with this statement:

> "Clearly, there is no legal evidence to support the finding of the Secretary who adopts the condition percentage determined by Mr. Henrici and, therefore, the decision is void, this being one of the fundamental factors necessary to a decision."

Facts in connection with depreciated value. Mr. Hermann C. Henrici was the engineer employed by the Government, who made the appraisal of appellant's structures at both hearings before the Secretary. As stated in paragraph 125 of the present decision (R. 91), the Government engineer found that the cost of reproduction new of appellant's structures was $2,811,037. Following the estimated condition per cent stated by the Government engineer, Henrici, for the specific property included by the Secretary as used and useful, the Secretary determined that the depreciated value of appellant's used and useful structures was 76.04 per cent of the cost of reproduction new. (See deci-

sion, par. 145, R. 104.) Appellant's engineer, S. F. Kosters, reached the conclusion that the depreciated condition of the property gave it a value equivalent to 89 per cent of the cost of reproduction new. (R. 579-583, inclusive, and respondent's (appellant's) exhibits 111 and 111-a which are amongst the original exhibits certified to this court.) The condition per cent stated by appellant's engineer, Kosters, exceeded that found by the Government engineer, Henrici, by 12.96 per cent. The difference of 12.96 per cent on the total cost of reproduction new found by the Government engineer ($2,811,037) amounts to $364,310. A 7 per cent return on this amount is $25,501 per year. This amount cannot be considered *de minimis* in connection with a property of this size and value.

We repeat, as we stated in the District Court, that the Government called no witness who had examined the property in order to determine the amount of existing depreciation, to substantiate the condition per cent of 76.04 adopted by the Government engineer, Henrici, and in turn adopted by the Secretary.

The condition percentage used by the Government engineer, Henrici, was the mathematical average of percentages of five of his assistants, *none of whom were produced as witnesses* (R. 428, 429). On direct examination, Henrici made the following statement:

> "Each of these engineers put down on paper his conception of the proper percentage condition of that property and this is shown in Government Exhibit No. 114 under columns headed 1, 2, 3, 4 and 5. The numbers refer to my engineers Cushing, Galbreath, Johnson, Schramm and McClintock. The column headed 'Average' is a mathematical average of the five estimates. These estimates were made independent of each other. One man did not know what the other percentages were until he compiled his report." (R. 428.)

On cross-examination, Henrici stated:

"The names of the engineers who are enumerated

> in Government Exhibit No. 114, in the rear portion of the exhibit under the heading 'Condition Per Cent' and in the five columns headed 1, 2, 3, 4, and 5, respectively are: 1, J. E. Johnson; 2, W. O. Galbreath; 3, A. T. Cushing; 4, A. F. Schramm; 5, H. E. McClintock. The figures used in arriving at cost of reproduction less depreciation are the figures contained in the last column under the heading 'Av.' They are the mathematical average of the five preceding columns. The instructions given these five men were as follows: I gave them a list of the buildings, a blank list, and told them to observe what the percentage condition of each building was, not to talk with any of the other four men nor to show the results of their work until they were all done, and I had tabulated the results. No further instructions were given." (R. 437.)

The record contains no syllable of evidence as to the qualifications of these men. Not one of these men, who actually determined the existing depreciation upon which the Secretary based his finding, was called as a witness.

To determine such an important item upon mere hearsay evidence, based upon the average condition found by five men who were not called as witnesses, violates even the rather loose rules as to admission of evidence by regulatory tribunals.

Passing upon a somewhat similar question in *Interstate Commerce Com.* v. *Louisville & N. R. Co.*, 227 U. S. 88, 93, 57 L. ed. 431, 434, this court said:

> "But the more liberal the practice in admitting testimony, the more imperative the obligation to preserve the essential rules of evidence by which rights are asserted or defended."

The same point was reaffirmed in *United States* v. *Abilene & S. R. Co.*, 265 U. S. 274, 288, 68 L. ed. 1016, 1023.

The exact point was well stated in the decision in *Greencastle Water Works Co.* v. *Public Service Commission*, 31 F. (2d) 600, at page 605:

> "Neither this court, nor the defendant Commission, can determine the fair value of the property of plain-

> tiff, unless such value is based upon legal evidence. In other words, the judgment of a court or the order of a Commission cannot be sustained unless the finding of such court or Commission, upon which such judgment or order is based, is supported by legal evidence which will justify such finding."

It must be apparent that *the District Court failed to pass upon the point made by appellant, namely, that there was no legal evidence to support the depreciated value stated by the Government engineer;* and that, in this condition of the record, it was necessary to adopt the only other evidence upon this point which was that of appellant's engineer.

For the reasons stated, the finding as to depreciated value in paragraph 145 of the Secretary's decision (R. 104) is (1) without any support in the legal evidence; (2) contrary to the only competent evidence; (3) confiscatory; and (4) void.

XIV.

THE DISTRICT COURT ERRED IN FAILING TO FIND THAT THE ANNUAL ALLOWANCE FOR A DEPRECIATION RESERVE FIXED BY THE SECRETARY WAS INADEQUATE, CONTRARY TO THE EVIDENCE, BEYOND THE STATUTORY POWERS OF THE SECRETARY, CONFISCATORY, AND VOID; AND IN FAILING TO EXERCISE ITS INDEPENDENT JUDGMENT UPON THE LAW AND THE FACTS.

This no. 7 of our statement of points to be relied upon (R. 939-940), which in turn refers to assignments of error nos. 25-50 (R. 154-157). Appropriate findings by the District Court were requested in paragraphs 11-13 of appellant's "petition for supplemental findings of fact" (R. 143).

It is alleged in appellant's petition in the District Court, section IX (H) (R. 10), that the Secretary allowed only $41,500 per annum for a depreciation reserve; that the

amount which should reasonably be allowed for a depreciation reserve is not less than $100,000 per annum; that the findings in connection with this subject, contained in paragraphs 173-177, inclusive, of the Secretary's decision, are not supported by the evidence of record; that the Secretary is without authority to prescribe the amount of this depreciation reserve; that the findings of the Secretary are contrary to the evidence and to the weight of the evidence; arbitrary; confiscatory; and deprive appellant unlawfully of its property in the amount of $58,500 per annum, without due process of law, in violation of the fifth amendment. In paragraph 6 (h) of the answer of the United States and the Secretary of Agriculture (R. 134) the Secretary admits in substance that the amount allowed for an annual depreciation reserve is $41,500 and denies the other allegations of the petition.

This is an important item to appellant. This question was treated rather summarily by the District Court in the single paragraph devoted to the subject on page 335 of the decision (11 F. Supp. 322).

Before discussing the merits we call attention to an obvious error in the decision of the District Court.

Error in Opinion of District Court.

Referring to the evidence of the Government on depreciation reserve the following statement occurs (p. 335 of decision):

> "That of Government witness Bachmann shows great care to discover the elusive fact of what and where *there was depreciation not taken care of by repairs*, and he pursued his investigation in great detail." (Emphasis ours).

This statement is assigned as error in assignment of error no. 25 (R. 154). In proof of error, we can only make a negative statement, namely, that *witness Bachmann*

made no effort whatever to discover, compute or otherwise determine the amount of depreciation, stated in dollars or quantities or in any other way, not taken care of by repairs.

Mr. Bachmann was in charge of audits and accounts for the Government (R. 443). His testimony dealt only with the past accounting of the company. As supporting our statement that Mr. Bachmann made *no* such study as that stated by the District Court in the foregoing quotation, we refer to the testimony of Mr. Bachmann (R. 451-462; R. 466-472; R. 570-572; inc., R. 575-576). In this testimony of Mr. Bachmann, there is not a word, much less a study, concerning "the elusive fact of what and where there was depreciation not taken care of by repairs."

In the nature of things, Mr. Bachmann could not testify upon that subject. He was an accountant and was simply stating what was shown by the books.

In connection with his oral testimony there was offered in evidence by Mr. Bachmann, as relating to depreciation reserve, sheets 12-19, inclusive, of Government exhibit 124 (one of the original exhibits certified to this court). It will be noted there that Mr. Bachmann made no effort to determine *the amount of depreciation not taken care of by repairs* but did make an effort to determine what the amount of a depreciation allowance should be *if set up upon a sinking fund basis, the interest to be compounded semi-annually at 5 per cent per annum.* To determine the question stated by the District Court would have been an engineering problem. No such study was made by the Government engineer, Mr. Henrici, nor by any other witness on behalf of the Government.

We regret to state that said finding by the District Court is plainly a misapprehension of what was contained in the record. Apparently, however, it had a great weight in the conclusion reached by the District Court upon this subject.

FACTS RELATING TO DEPRECIATION RESERVE.

1. The discussion of this question in the Secretary's decision is contained in paragraphs 173-177, inclusive, (R. 117-118). The Secretary there finds that the average repairs on appellant's used and useful structures and equipment have been $38,500 per annum during the period 1922-1932. The Secretary then finds that $80,000 per annum (par. 177) is an adequate amount to be included in appellant's annual operating expenses "to cover repairs and provisions for depreciation reserve." Thus, the amount allowed annually for a depreciation reserve, as alleged in the petition and admitted in the answer, is $41,500 ($80,000 — $38.500 = $41,500).

2. In 1922, the American Appraisal Company made an appraisal of appellant's property and, in its report, suggested a basis for an annual depreciation reserve thereafter to be followed on a straight line basis (Secretary's decision, par. 174, R. 117). Appellant thereafter set up a depreciation reserve in accordance with said appraisal, as shown on page 15 of Government exhibit 124 (one of the original exhibits certified to this court). In 1932, the amount set aside for a depreciation reserve was $122,509.92 (R. 574). In the first decision (par. 110, appendix to brief, p. 55) the Secretary determined that $102,000 per year was an adequate allowance for repairs, maintenance, replacements, and a reserve for depreciation, of which $65,000 per annum was the amount allowed for a depreciation reserve. A majority of the District Court was of opinion that the allowance in the first decision "was upon the weight of the evidence too small." *St. Joseph Stock Yards Co.* v. *United States,* 58 F. (2d) 290; footnote, p. 295.

3. Upon the second hearing, appellant employed a competent and qualified engineer and statistical analyst to make a study of the question of depreciation reserve. He is Mr.

Henry J. Saunders, whose testimony upon the subject is to be found at pages 641-768 of the record. The exhibits offered in connection with Mr. Saunders' testimony are respondent's (appellant's) exhibits 116-130, inclusive, which are amongst the original exhibits certified to this court. Mr. Saunders came to the conclusion that the basis of life expectancy for certain of appellant's properties might be lengthened to the extent outlined in his testimony, thereby reducing the amount of the annual depreciation reserve to $100,000. Consequently, the issue comes to this: appellant is contending that the minimum proper allowance for a depreciation reserve is $100,000, while the Secretary has prescribed $41,500 or $58,500 per annum less than that considered by the appellant to be adequate. The sole question involved here is what will constitute a fair and reasonable annual allowance for depreciation *for the future.*

4. The Secretary finds that the cost of reproduction new of appellant's used and useful structures as of August 1, 1932, was $2,637,186 (par. 148 of decision, R. 105).

5. The composite average life of the property, as per Government exhibit 114 (R. 433-435), the witness being Government engineer Henrici, is 24.8 years, and *the annual depreciation, as estimated by Mr. Henrici in the same exhibit,* $113,492. If the structures determined by the Secretary to be not used and useful (par. 126 of decision, R. 92) are eliminated from said Government exhibit 114, *the amount of the annual depreciation as estimated by the Government engineer is reduced to* $108,795 *per annum.* According to Government exhibit 114, the average lives of the structures range from 15 years for pens and alleys through a number of different ages up to 50 years for certain sewer and water pipes.

6. Under the study by appellant's engineer Saunders,

the annual depreciation allowance of $100,000 would equal the cost of reproduction new of the structures in 26.37 years. Under the estimate made by the Government engineer, Mr. Henrici, the depreciation at the rate of $108,795 per annum would equal the cost of reconstruction new in 24.8 years.

The allowance made by the Secretary of $41,500 per annum for a depreciation reserve *would require 63 years to equal the cost of reproduction new, or more than twice the probable average life of the property as estimated by the Government engineer, and by appellant's engineer.* The allowance of $41,500 per year is at the rate of 1.6 per cent per annum of the cost of reproduction new as determined by the Secretary, whereas the Government engineer, in said exhibit 114 (R. 433-435; appendix to brief, p. 78) finds that the average annual rate of depreciation is 4.037 per cent per annum.

7. The annual rate of depreciation shown in Government exhibit 114, being $108,795 after deducting property found by the Secretary to be not used and useful, the allowance by the Secretary of $41,500 is less by $67,295 per year than the amount indicated as proper by the Government engineer.

8. The witness (Saunders, R. 641-768) who made a study for appellant determined upon an average depreciation in the property of 3.77 per cent per annum and recommended an annual reserve of $100,000 as necessary for this purpose at said annual rate; that is to say, the witness for appellant estimated the life of the property as being somewhat longer than the estimate made by the Government engineer and, consequently, the annual amount necessary for a depreciation reserve as being somewhat less than that indicated by Government exhibit 114.

9. The amount allowed by the Secretary for an annual

depreciation reserve, namely, $41,500, would have to earn a net return *after taxes of 7 per cent per annum continuously, such interest to be compounded annually.* in order to equal the cost of reproduction new ($2,637,186) during the life estimated by the Government engineer of approximately 25 years.

10. In his first decision in this case of July 20, 1931, the Secretary allowed $102,000 per annum for repairs, maintenance, replacements, and depreciation reserve (pars. 105-110, inc., appendix to brief, pp. 53-55). Of said amount of $102,000 per annum, $65,000 was the amount allowed for a depreciation reserve. In the present decision, the allowance of $41,500 is, therefore, $23,500 per year less than the allowance in the first decision; notwithstanding the fact that in *St. Joseph Stock Yards Co.* v. *United States,* 58 F. (2d) 290, footnote p. 295, a majority of the District Court expressed the opinion that this allowance of $102,000 "was upon the weight of the evidence too small."

11. In the first decision (par. 90, appendix to brief, p. 46) the Secretary found that the cost of reproduction new of appellant's used and useful structures was $2,850,735. In the present decision, the Secretary found that the cost of reproduction new of appellant's used and useful structures as of August 1, 1932, was $2,637,186 (par. 148, R. 105). The two figures do not exactly correspond because the Secretary added $143,143 for additions and betterments since the first decision, but excluded the Transit House, given a cost of reconstruction new in the second hearing by the Government engineer of $132,726 (Government exhibit 114, R. 434). Allowing for these inclusions and exclusions, the difference between the cost of reproduction new in the first decision and in the second decision is $223,966. The depreciation reserve, as will later be shown, must be based upon cost of reproduction new. Assuming a 25-year life, in accordance with the estimate of the Government en-

gineer, the lesser cost of reproduction new of $223,966 in 1932 could not justify a reduction of more $8,959 per year in the allowance for a depreciation reserve, even if the Secretary had been correct in his first decision. The Secretary has, however, reduced the amount allowed in the first decision by $23,500 per annum.

The facts and figures stated in the preceding eleven numbered paragraphs are the outstanding ones which must be considered in discussion of this subject. These proposed findings were suggested to, but not made by the District Court.

PRINCIPLES ESTABLISHED BY THIS COURT CONCERNING DEPRECIATION RESERVE.

Aside from the decision that an adequate depreciation reserve must be allowed as a part of operating expenses (*Knoxville* v. *Knoxville Water Co.*, 212 U. S. 1, 53 L. ed. 371), we are able to discover but two definite principles decided by this court concerning the allowance for a depreciation reserve. They are the following:

1. "The question of the amount which should be allowed annually for depreciation is a question of fact." *Clark's Ferry Bridge Co.* v. *Public Serv. Com.*, 291 U. S. 227, 240, 78 L. ed. 767, 774.

2. The allowance for annual depreciation must be based upon present value. "It is the settled rule of this court that the rate base is present value, and it would be wholly illogical to adopt a different rule for depreciation." *United R. & Electric Co.* v. *West*, 280 U. S. 234, 254, 74 L. ed. 390, 411.

THE AMOUNT ALLOWED BY THE SECRETARY APPEARS TO BE LOWER THAN THAT AUTHORIZED IN ANY OF THE DECIDED CASES.

We have pointed out in the paragraph numbered 6 above that the allowance of $41,500 per annum for a depreciation

reserve would require 63 years to equal the cost of reproduction new and would, consequently, be at the rate of 1.6 per cent per annum. This appears to be a lower rate than any allowance authorized in the federal courts.

In *San Joaquin & Kings River C. & I. Co.* v. *Stanislaus County,* 191 Fed. 875, 886, the court allowed depreciation at the rate of approximately 3 per cent per annum.

In *Pioneer Telephone & Telegraph Co.* v. *Westenhaver,* 118 Pac. 354, 363, the court allowed 7 per cent per annum for a depreciation reserve.

In *Fort Worth Gas Co.* v. *City of Fort Worth,* 35 F. (2d) 743, 747, the court allowed a depreciation reserve of approximately 4 per cent per annum.

In *Wichita Gas Co.* v. *Public Service Commission,* 3 F. Supp. 722, 727, the court allowed a reserve amounting to 3 per cent per annum and disapproved an allowance of 1.87 per cent per annum, which is slightly more than that allowed by the Secretary in this case.

In *Pacific Gas & Electric Co.* v. *Railroad Commission,* 5 F. Supp. 878, 880, one of the grounds stated by the court for allowing the injunction was that the annual depreciation allowance was only 1.8 per cent, or more than the allowance in the present case.

In *Chesapeake & Potomac Telephone Co.* v. *West,* 7 F. Supp. 214, 236, the court approved 4 per cent per annum.

In *Clark's Ferry Bridge Co.* v. *Public Serv. Com.,* 291 U. S. 227, 78 L. ed. 767, this Court approved (and we believe it is the only time it did approve such a basis) a depreciation reserve which, set aside each year *"with 4 per cent simple interest,"* would be sufficient at the end of 50 years to rebuild a bridge. That was a single structure which the Court estimated would have a life of 50 years, quite different from a stockyards with many property units with varying lives and requiring replacements from year to year.

We have pointed out that the allowance by the Secretary of $41,500 would have to be so invested as to produce *7 per cent per annum, after taxes, compounded annually,* in order to produce the cost of reconstruction new of appellant's property in 25 years, the life estimated by the Government engineer. If, as in the *Clark's Ferry Bridge Company case,* the depreciation reserve had been estimated upon a basis of 4 per cent simple interest per annum upon the annual contributions to the reserve, then, the annual allowance for the reserve, in order to equal $2,637,186 in 25 years, would have to be $71,275 per year or $29,775 in excess of the amount allowed by the Secretary. *No rate of depreciation on such a low percentage basis, or requiring such a high interest return, has found approval in the decided cases.*

THE SECRETARY HAS NO STATUTORY AUTHORITY TO PRESCRIBE THE AMOUNT OF A DEPRECIATION RESERVE.

We call attention to the fact that the *Packers and Stockyards Act, 1921,* does not authorize the Secretary to prescribe the amount of an annual allowance for a depreciation reserve. Such authority is specifically given to the Interstate Commerce Commission by section 20 (5) of the *interstate commerce act,* U. S. C. A. tit. 49, § 20 (5). The fact that Congress deemed it necessary to enact such a provision as a part of the *interstate commerce act,* in order to give the Commission that power, is itself indicative of the absence of such authority in the Secretary under a statute which contains no such provision.

Lindheimer v. *Illinois Bell Teleph. Co.,* 292 U. S. 151, 78 L. ed. 1182, also arose under a statute which gave the Illinois Commerce Commission power to prescribe the amount of the annual depreciation allowance. That section is chapter 111⅔, § 14, *Smith-Hurd Illinois Revised Statutes* 1935, and reads as follows:

"The Commission shall have power, after hearing,

> to require any or all public utilities to keep such accounts as will adequately reflect depreciation, obsolescence and the progress of the arts. The Commission may, from time to time, ascertain and determine and by order fix the proper and adequate rate of depreciation of the several classes of property for each public utility; and each public utility shall conform its depreciation accounts to the rates so ascertained, determined and fixed."

There has been no charge here of fraud, waste or abuse of discretion. We do not say that the Secretary may not inquire into the question from that standpoint. But there is certainly more latitude to be allowed to management in the absence of such statutory power than in a case where the regulatory tribunal is authorized by statute to fix the amount of an annual depreciation reserve and the company thereafter is required to follow such order.

We submit that, where the estimate set up by appellant is based upon an intelligent study of the facts, of the history of appellant's structures, and indicates an honest attempt to determine the amount which should be set aside as an annual depreciation reserve, the Secretary may not change that amount unless and until such a period has passed in the life of the property as will show that the amount assigned to that purpose was wasteful, fraudulent, or plainly excessive. This would mean a period within which all the major structures, such as the Exchange Building, pens, alleys, etc., had reached the end of their useful lives and been renewed.

Where the regulatory tribunal, such as the Secretary of Agriculture, is *not* authorized by law to prescribe the amount of a depreciation reserve, it is submitted that *his findings are not entitled to any greater weight than are those of the experts employed by appellant or of its officers and directors.* Under such circumstances, lacking the statutory power, the Secretary

cannot "ignore items charged by the utility as operating expenses unless there is an abuse of discretion in that regard by the corporate officers." *Missouri ex rel. S. W. Bell T. Co.* v. *Public Serv. Com.*, 262 U. S. 276, 289, 67 L. ed. 981, 985. *And the District Court should exercise its independent judgment on the facts.*

Neither may the District Court dispose of so important an item merely by the statement (11 F. Supp. at page 335) "we are certain there is no clear showing he was not right." Since the Secretary did not have statutory authority to do what he did, it was the duty of the District Court to weigh the evidence and decide accordingly.

THIS COURT HAS NEVER AUTHORIZED OR REQUIRED THE IMPOSITION OF A COMPOUND INTEREST SINKING FUND BASIS FOR AN ANNUAL DEPRECIATION RESERVE.

In *Lindheimer* v. *Illinois Bell Teleph. Co.*, 292 U. S. 151, 167, 78 L. ed. 1182, 1192, this court defined depreciation as follows:

> "Broadly speaking, depreciation is the loss, not restored by current maintenance, which is due to all the factors causing the ultimate retirement of the property. These factors embrace wear and tear, decay, inadequacy, and obsolescence. *Annual depreciation is the loss which takes place in a year.*" (Emphasis ours.)

The *straight line method* has been prescribed for railroads by the Commission. *Telephone and Railroad Depreciation Charges*, 177 I. C. C. 351.

The *straight line method* is defined by the American Society of Civil Engineers as one which makes provision from earnings for equal annual depreciation allowances of such size for any property unit that the sum of the allowances without interest will equal the cost, less salvage, of each unit when it reaches the end of its estimated service life (R. 648).

The *sinking fund method* is described by the same society as one which makes provision from the earnings for equal annual depreciation allowances of such size for any property unit that if these allowances are invested in a sinking fund, they will, with accumulations of interest, compounded annually, amount to the cost, less salvage, of the unit at the time when it reaches the end of its estimated service life (R. 649).

It must be apparent that the Secretary has here prescribed the sinking fund compound interest method. By reference to Government witness Bachmann's exhibit 124, pages 12-15, inclusive, (one of the original exhibits certified to this court) it will be observed that Mr. Bachmann, using *the structural costs of reproduction new and the expected life tables contained in Government exhibit* 114 of Hermann C. Henrici, Government engineer, (R. 433; appendix to brief, p. 78) restated Mr. Henrici's conclusion that an annual depreciation reserve of $113,492 would be necessary on the straight line basis. Mr. Bachmann then made a computation to determine how much the annual allowance would have to be *upon a 5 per cent semi-annual sinking fund basis,* that is, upon an annual contribution to be compounded semi-annually at 5 per cent. Upon this computation, *the necessary allowance would be* $50,000 *per year* (R. 457). But the Secretary did not allow even $50,000 per year. He allowed $41,500 per year. As we have stated in paragraph 9, page 139, this amount of $41,500 would have to earn a net return after taxes of 7 per cent per annum continuously, *such interest to be compounded annually,* in order to equal the cost of reproduction new at the respective terminations of the lives of the individual property units.

We shall hereafter advert to the impropriety of imposing a *compound interest sinking fund method* in which appellant has to take the risk of investing and reinvest-

ing the funds. At this point, we merely desire to point out that we cannot, in any of the cases decided in this court, find one where the court has approved or required the *compound interest sinking fund method.* The nearest approach to that method ever approved in this court was in *Clark's Ferry Bridge Co.* v. *Public Serv. Com.*, 291 U. S. 227, 78 L. ed. 767, where the court affirmed an order of the Pennsylvania Commission in which the amount of the annual depreciation allowance for a single structure (a bridge) was based upon 4 per cent *simple interest.* If in this case we use the cost of reproduction new adopted by the Secretary of $2,637,186 and for an annual depreciation reserve an amount to be set aside each year at 4 per cent *simple* interest, the annual allowance will have to be $71,275 per year, instead of the $41,500 per year allowed by the Secretary, or $29,775 in excess of the amount allowed by the Secretary.

THE SINKING FUND METHOD SHOULD GO ONLY WITH AN UNDEPRECIATED RATE BASE AND THE STRAIGHT LINE METHOD WITH A DEPRECIATED RATE BASE.

Upon reason, it has been the opinion of competent authorities that the *sinking fund method* of establishing a depreciation reserve should go only with an *undepreciated* rate base and that where a *depreciated rate base* is used the *straight line method* should be followed. In this case, the Secretary has used a *depreciated rate base,* the cost of reproduction new of appellant's structured found used and useful by the Secretary being $2,637,186 and the cost of reproduction new less depreciation being $2,039,616 (par. 148 of decision, R. 105). It is the latter figure which has been used to compute the rate base.

In prescribing the straight line method for the use of railroads, this point was the subject of an extended discussion by the Commission in the proceeding entitled *Tele-*

phone and Railroad Depreciation Charges, 118 I. C. C. 295; 177 I. C. C. 351. For the force of its reasoning, we might hope that the court could find it possible to read the discussion in the Commission's opinions, printed at pp. 81-87 of the appendix to this brief. The Commission quoted with approval the contention upon this point of the Public Service Commission of Oregon (p. 355) as follows:

> "Manifestly, the *straight-line method* of calculating depreciation cannot properly be used in conjunction with an *undepreciated rate base,* nor should the *sinking fund principle* be followed where a *depreciated rate base* is considered. In other words, the public cannot equitably be required to pay for capital as it is consumed, *i. e.,* on the straight-line basis, and at the same time be required to pay a return upon such consumed capital, *i. e.,* on an undepreciated rate base. Nor should a utility company be asked or required to forego its legitimate return upon the full undepreciated value of its property unless its capital is fully repaid as rapidly as it is consumed." (Emphasis ours.)

This point has apparently been little discussed in the decisions of the lower courts. It was mentioned in *Los Angeles Gas & Electric Corporation* v. *Railroad Com'n.,* 58 F. (2d) 256. This is the case which was before the Court in *Los Angeles G. & E. Corp.* v. *Railroad Com.,* 289 U. S. 287, 77 L. ed. 1180. The District Court does not discuss the amount allowed for a depreciation allowance but states, at 58 F. (2d) 261:

> "It is to be noted that under accepted rules, as between straight line and sinking fund methods, *the sinking fund base is undepreciated,* while the *straight line base is a depreciated base.*" (Emphasis ours.)

The concurring opinion of Judge Wilbur in the same case, at page 279, made a similar statement.

In the present case, the Secretary has undertaken to cut appellant's revenues and values in both ways, that is, he uses a *depreciated* rate base and allows an amount for a

depreciation reserve which must necessarily be accrued on a *compound interest sinking fund method* at 7 per cent net compounded annually. This is contrary both to precedent and reason.

The Secretary of Agriculture has adopted an amount and method which is directly contrary to that which would accrue were this stockyards subject to the regulation of the Commission, which has statutory power to prescribe a depreciation allowance, while the Secretary has not. If it be said that the straight line method may, in certain cases, ultimately result in the accrual of too large a reserve, the answer to that proposition has been stated in the decisions of the Commission and is apparent. All that is necessary is to extend the expected lives of the structures to the extent that may be indicated by experience. This, appellant has done in the very elaborate study made by its own witness, Mr. Saunders (R. 641-768), which shows that the amount to be set aside annually should be $100,000.

THE STRUCTURE DEALT WITH IN THE CLARK'S FERRY BRIDGE COMPANY CASE IS DISSIMILAR TO APPELLANT'S PLANT.

In *Clark's Ferry Bridge Co.* v. *Public Service Com.*, 291 U. S. 227, 78 L. ed. 767, this Court quoted with approval the following statement of the Pennsylvania Supreme Court in the decision below:

> "'It (the Commission) allowed $7,678 annually. This sum set aside each year, with 4% *simple* interest will in fifty years produce approximately $767,800, sufficient to rebuild the bridge as now valued. *The straight line method advocated by the Company will in fifty years with 4% simple interest produce a fund twice as great as that necessary to replace the bridge. The straight line method is often used for short-lived structures, or plants of a character that they can be restored from time to time to the original condition of efficiency.* * * * *It is not so fair or equitable when applied to a long-lived structure or one that is disin-*

tegrating gradually and continuously and not capable of being restored to its original condition. The company may not be required to apply the income received from the depreciation fund to make up any deficit of operation (*Public Utility Commrs.* v. *New York Teleph. Co.*, 271 U. S. 23, 70 L. ed. 808, 46 S. Ct. 363), but it is not entitled to an allowance, which exclusive of interest earned on the fund, will be sufficient to rebuild the bridge, when its life is done, but only to such an allowance as will with reasonable interest added make a fund sufficient to replace the bridge when it requires replacement.' In this view, the Court thought the amount allowed by the Commission to be 'fair and reasonable in the circumstances.' The Court added that the Commission had included in its allowance for operating expenses an item of $1,800 for 'maintenance.'" (Emphasis ours.)

The distinction between this type of structure and those operated by appellant is even more clearly emphasized in the decision in the court below, *Clark's Ferry Bridge Co.* v. *Public Service Commission*, 165 Atl. 261. The case involved but a single structure which the court estimated would have a life of 50 years.

In contrast with those facts, we call attention to the different kind of a plant operated by appellant. The principal structures in that plant are set forth in connection with the testimony of the Government engineer, Mr. Hermann C. Henrici (R. 433-435, Government exhibit 114, appendix to brief, p. 78). In order to list the major portion of those structures according to the age assigned to them by Mr. Henrici, we have merely changed the order in the table printed at page 80 of the appendix to this brief, so as to group the various kinds of property in accordance with the life expectancy determined by the Government engineer. It will be observed that, broadly speaking, the Government engineer estimates a life of 20 years for live stock pens and similar wooden structures; 30 years for scales, etc.; 35 years for paving and sewers; 40 years

for brick buildings; and 50 years for some such items as water pipe, sewer pipe, etc.

Thus, we do not have a single structure which will wear out at a single date, but many comparatively short-lived structures which have to be replaced from year to year. Such a condition will obviously interfere with the use of the 4 per cent *simple* interest method approved in the *Clark's Ferry Bridge Company case,* because of the practical difficulty of permitting the accrual of principal and interest intended to replace the numerous units as their useful life expires from month to month.

THE SECRETARY HAS FAILED TO MAKE ANY ALLOWANCE FOR TAX DEDUCTIONS IN CONNECTION WITH THE DEPRECIATION ALLOWANCE.

The depreciation allowance of $41,500 would have to be invested so as to earn interest continuously at the rate of 7 per cent per annum, *compounded annually,* to equal the cost of reproduction new determined by the Secretary, in 25 years, the estimated life fixed by the Government engineer. This assumes that each year the accrual of $41,500 could be placed in a fund thereafter to earn compound interest. But it overlooks entirely the taxes which would be levied upon that fund and the annual income therefrom. See cross-examination of Government witness Bachmann (R. 466-467). This testimony demonstrates that if out of this fund $100 were invested in a 5 per cent bond, the various taxes upon the bond and upon the 5 per cent income therefrom, including personal property tax of the city, personal property tax of the county, franchise tax, Missouri state income tax, and federal income tax, would be $3.57 for each $5.00 of return, leaving a net return to the owner of the bond of only $1.43, or 1.43 per cent. Even upon Mr. Bachmann's theory of a 5 per cent investment, with interest compounded semi-annually, the fund

would fall short by about two-thirds of producing the desired amount. This was admitted by Mr. Bachmann (R. 467).

THE SECRETARY MAY NOT LAWFULLY REQUIRE APPELLANT TO INVEST MONEY FOR THE PURPOSE OF EARNING A RETURN TO PROVIDE AN ADEQUATE DEPRECIATION RESERVE.

The allowance of $41,500 could equal the cost of reproduction new of the property at the end of the life expectancy stated by the Government only by investing that amount so that it would earn a net return of 7 per cent to be compounded annually. It is respectfully submitted that the money earned for services rendered belongs absolutely to appellant and that *the Secretary is not empowered by law to require appellant to do any specific act with money lawfully obtained for services rendered.* We repeat that *the Secretary is given no statutory authority with respect to the amount of a depreciation reserve or the method in which it should be invested after it is collected.* In *Board of Public Utility Comrs.* v. *New York Teleph. Co.*, 271 U. S. 23, 32, 70 L. ed. 808, 813, this court said:

> "Customers pay for service, not for the property used to render it. * * * By paying bills for service they do not acquire any interest, legal or equitable, in the property used for their convenience or in the funds of the company."

IT WOULD BE IMPRACTICABLE TO USE THE DEPRECIATION RESERVE IN ADDITIONS AND IMPROVEMENTS TO THE PROPERTY OR IN APPELLANT'S BUSINESS.

This point is perhaps obvious. To bring about the desired result, the original amount in the fund and all the accretions thereto would have to be earning 7 per cent annually, to be compounded each year. *The fund could not be broken up by withdrawing from it small sums as they were needed.*

If the money were invested in additions to the plant as they might be necessary, it would be necessary to earn a fair return, not only upon the additional property in the plant but also upon the amount invested from the sinking fund. Assuming 7 per cent to be a fair return, this could not be accomplished unless appellant could earn 14 per cent upon the specific pieces of property. Such a complex method of keeping accounts and the use of money was condemned as impracticable in Transactions of the American Society of Civil Engineers, December, 1917 (R. 685, 688).

INVESTMENT IN INTEREST BEARING SECURITIES WOULD BE IMPRACTICABLE.

The investment of the allowance of $41,500 per year in interest bearing securities would be impracticable for reasons well known to this court. No one knows, nor was any Government witness upon this record able to suggest, a security in which the fund could be invested with an assurance of earning 7 per cent each year without interruption or without loss of interest or principal. If the sinking fund method were to be used at all, the investment could only be in securities of as high grade as Government bonds which can hardly be purchased to give a return of 3 per cent. But the amount adopted by the Secretary would require a return of 7 per cent.

APPELLANT HAS DEFINITELY PROVED THE NECESSITY FOR AN ANNUAL DEPRECIATION ALLOWANCE OF NOT LESS THAN $100,000.

The only question here to be decided is what will constitute a proper annual depreciation allowance for the future. To determine this question, upon the hearing before the Secretary, appellant employed an experienced engineer and statistical analyst of high qualifications who has had valuable experience upon this subject. This was Mr.

Henry J. Saunders. We invite particular attention to all of Mr. Saunders' testimony upon direct and cross-examination, which appears at pages at 641-766 of the record. We state here only a brief summary of the studies made by Mr. Saunders.

Mr. Saunders extended somewhat the estimated lives of the various classes of appellant's property, the result being that he obtained an average annual depreciation of 3.77 per cent per year (R. 668), as compared with 4.037 per cent obtained by the Government engineer Henrici (R. 433-435, appendix to brief, p. 78). Mr. Saunders made very complete studies of the results of the funds which had been set up by appellant in the past. He found that, with respect to the items of property which had actually reached the end of their service lives and been retired, *the amount set aside in the depreciation reserve had always been inadequate to meet the replacement cost.* This is demonstrated by respondent's (appellant's) exhibits 120-123, inclusive, which are amongst the original exhibits certified to this court, and the testimony of Mr. Saunders in connection therewith (R. 654-657); that is to say, the estimated service lives and the estimated amounts for the specific units of appellant's property heretofore set up by appellant were too low in that, so far as the units had been retired, they were retired short of the estimated service life and, consequently, the amount in the depreciation reserve was inadequate.

This testimony also shows some of the errors in the Secretary's decision. For example, in paragraph 175 of the decision (R. 117), it is stated:

> "The character of the pens and alleys is such that they can be maintained at a fairly uniform condition by adequate repairs."

This would indicate that it is not necessary to set up a depreciation reserve for pens and alleys. On the contrary,

the study made by Mr. Saunders of appellant's experience, as indicated by its books, shows that in the years 1926 to 1930, inclusive, appellant actually retired pen structures having an investment value of $41,639.85. See column 2, page 1, of respondent's (appellant's) exhibit 126, one of the original exhibits certified in this case. Of course, if it had been possible to keep the pens in fairly uniform condition by adequate repairs, such retirements would not have been made.

THE RECORD SHOWS THE PROPERTY HAS NOT EXISTED A SUFFICIENT LENGTH OF TIME TO CAUSE IT TO REACH A PERIOD OF NORMAL DETERIORATION.

In paragraph 176 of the Secretary's decision (R. 118), it is stated that the property has "existed a sufficient length of time to cause it to have reached that condition of normal deterioration wherein ordinary repairs and replacements tend to keep its physical condition almost the same from year to year."

Likewise, it is stated in paragraph 177 (R. 118), that "the lack of sufficient experience does not relate to the greater part of the value of the property."

Apparently, it is assumed by the Government that the stockyards property was created as it now exists about 1895 and, therefore, has been in existence about 40 years. The contrary is shown by the testimony of Mr. Churchill (R. 625-627). At first sufficient pens and alleys were built only to meet the demands at that time. The Exchange Building is approximately 30 years old. The first Exchange Building was burned and the present Exchange Building was erected about eight blocks north of the former Exchange Building (first hearing, R. 241). The estimated life of this building is 50 years according to appellant's engineer, and 40 years according to the Government engineer, Mr. Henrici.

In order to demonstrate the very material percentage of appellant's structures which have not yet reached the end of their service lives, we have printed at page 80 of the appendix to the brief what is merely a restatement of items taken from Government exhibit 114, so changed as to group those given the same age expectancy by the Government engineer. Practically none of the property included within the 50-year, 40-year, 35-year, and 30-year life groups have reached the point where replacement has been necessary, having not yet reached the life estimated by the Government engineer. Consequently, a study of appellant's experience as to retirements, as made by the Government witness Bachmann, does not measure the depreciation which is occurring or the amount of the funds which may shortly be necessary as the end of service lives of the various units of property is reached.

NO SURPLUS IN DEPRECIATION RESERVE FOR PAST YEARS MAY BE USED AS A BASIS FOR REDUCING FUTURE RATES.

We desire to repeat here and to emphasize a point already made at page 59 of this brief. In the District Court, it was argued that, unless the Secretary's findings with respect to the annual allowance for depreciation, are inadequate, no confiscation can be demonstrated. This was apparently upon the theory that an excessive amount had been set aside for a depreciation reserve in the past. Even if that were true, it cannot be now appropriated to public use. *Board of Public Utility Comrs.* v. *New York Teleph. Co.*, 271 U. S. 23, 70 L. ed. 808. This overlooks the fact, however, that the rates prescribed by the Secretary, at the time of the hearing, and during the prior six years, would have produced a confiscatory return, *even allowing for an annual depreciation reserve only the amounts approved by the Secretary.* The argument of the Government runs upon the assumption that appellant's gross and

net operating income is as great now and will be for the future as it was for the peak years of 1928 and 1929. This is exactly contrary to the fact. In 1928, appellant's gross operating income for rate making purposes was $817,201. See table, page 55 of this brief. In 1932, it was only $669,629, or $147,572 less. Thus, the difference in gross income between 1928 and the time of the hearing would have more than wiped out the entire depreciation reserve claimed as proper by appellant. In 1928, appellant's *net* operating income for rate making purposes was $339,267. See table, page 55 of this brief. In 1932, it was $190,656, or $148,611 less than in 1928.

SUMMARY OF APPELLANT'S CONTENTIONS WITH RESPECT TO ANNUAL ALLOWANCE FOR DEPRECIATION RESERVE.

1. The decisions and the facts demonstrate that the annual allowance of $41,500 is inadequate.

2. To produce the required result, the allowance made by the Secretary would have to be invested in securities which would produce *7 per cent per annum after taxes.* The deduction of taxes would reduce the income from the fund by approximately two-thirds.

3. If based on 4 per cent *simple* interest, as in the *Clark's Ferry Bridge Company case, supra,* the annual charge would have to be increased to $71,275 per year; but the investment would have to net a gross return *more than double* 4 per cent in order to allow appellant a net income of 4 per cent *simple* interest per year.

4. The Interstate Commerce Commission has disapproved the compound interest sinking fund method after mature deliberation; has held that the sinking fund method must accompany an *undepreciated* rate base, while the straight line method should be used with a *depreciated* rate base. Decisions of the lower courts also sustain this conclu-

sion. The Income Tax Bureau uses the straight line method only. These conclusions of other federal agencies are persuasive and entitled to weight.

5. The failure to allow for necessary tax deductions from income demonstrates the confiscatory character of the annual allowance of $41,500.

6. The Secretary has no statutory authority, directly or indirectly, to require appellant to invest money for the benefit of its patrons, and to assume the risk of such investment, for the purpose of earning a return to provide an adequate depreciation reserve, not paid at the time of use by the patrons.

7. It would be impracticable to use the annual depreciation allowance, made by the Secretary, for additions and improvements to the property.

8. The experience of the company shows that the amounts heretofore set aside for an annual depreciation reserve have not been adequate at the expiration of specific units of property.

9. Appellant has definitely proved the necessity for an annual depreciation allowance of not less than $100,000.

10. Certain errors and fallacies are contained in the Secretary's decision concerning the depreciation reserve, amongst them being the following:

(a) The amount of an appropriate depreciation reserve cannot be determined by a study of retirements during a comparatively short period within which only a small portion of the structures were retired.

(b) The statement that the pens and alleys can be maintained at uniform condition by adequate repairs is contrary to the evidence.

(c) The record shows that the property has not existed a sufficient length of time to cause it to reach a period of normal deterioration.

11. The decision of the Secretary respecting a deprecia-

tion reserve would unlawfully deprive appellant of at least $58,500 of income per year.

12. The District Court erred in declining to exercise its independent judgment upon the law and the facts.

13. For these reasons the order is contrary to the evidence, confiscatory, and void.

XV.

THE DISTRICT COURT ERRED IN FAILING TO FIND THAT THE REAL AND TRUE VALUE OF APPELLANT'S LAND IN ZONE A EXCEEDED THE VALUE FIXED BY THE SECRETARY BY APPROXIMATELY $275,000, AND IN FAILING TO EXERCISE ITS INDEPENDENT JUDGMENT UPON THE FACTS AND LAW.

The alleged errors of the District Court are covered by no. 4 of our statement of points to be relied upon and by assignments of error nos. 15 and 16.

FAILURE OF DISTRICT COURT TO EXERCISE INDEPENDENT JUDGMENT UPON THE LAW AND THE FACTS.

In assignment of error no. 15 appellant avers that the District Court erred because of its failure to exercise its independent judgment upon the law and the facts concerning land values. We need not fully discuss the question at this point, for the failure of the court to exercise its independent judgment upon the law and the facts, as applied to all of the contested points, is the subject of the chapter appearing at pages 10-22 of this brief. We may remark that the statement of the court concerning land values (11 F. Supp. 322, 333) makes it very evident that the court specifically declined to weigh the evidence upon this subject.

SCOPE OF APPEAL.

In the District Court, as well as upon this appeal, we assigned error only as to values fixed by the

Secretary for zone A (decision, par. 110, R. 83). The reason is that the values fixed by the Secretary for the other zones (par. 121, R. 88) fairly represent an average of the values fixed by the three land appraisers, Zelinski for the Government, and Spratt and Quinn for appellant. With respect to zone A, however, which is by far the most valuable of the land used by appellant for stockyards purposes, it is respectfully submitted that the Secretary fixed a value so low as to amount to confiscation.

IMPORTANCE OF LAND VALUES IN ZONE A.

The Secretary finds that 3,003,973 square feet of land in appellant's zone A are used and useful for stockyards purposes (pars. 90 and 111 of decision, R. 69 and 84). This is about 70 per cent of the total amount of land found to be used and useful; and zone A represents about 75 per cent of the total value of appellant's land as determined by the Secretary.

In the first decision (par. 73, appendix to brief, p. 38) the Secretary found that the value of the land in zone A was 25 cents per square foot. In the present decision, he finds that the same land has a value of 16 cents per square foot. This is a reduction of 9 cents per square foot, or 36 per cent, since the first decision; and that reduction, applied to the 3,003,973 square feet, amounts to $270,357 in value. A return of 7 per cent upon this difference in value is $18,925, a substantial amount in determining whether the totality of appellant's income is excessive.

THE CHANGE IN VALUE DETERMINED BY THE SECRETARY IS SO GREAT AS TO REQUIRE CAREFUL EXAMINATION.

On the first hearing, all three of the land appraisers (one for the Government and two for appellant) valued the land in zone A at a higher unit price than that allowed by

the Secretary. The Government appraiser, W. L. Mack, valued this land at 35 cents per square foot (R. 185). Appellant's appraisers, Spratt and Atkinson, valued this land at 30 cents per square foot. (R. 253, R. 267). The Secretary fixed the value at a lower figure than that determined by either the Government's or appellant's appraisers, namely, 25 cents per square foot (par. 73, first decision, appendix to brief, p. 38).

In 1932, in the depth of the depression, when the second valuation was made, Spratt reduced his value for zone A to 26 cents per square foot (R. 770). Atkinson had died in the meantime. An additional appraiser Theo. J. Quinn, employed by appellant on the second hearing, then appraised the land in zone A at 35 cents per square foot. If we adopt the change in value fixed by Spratt who had appraised the land in both periods, and was the only man who did so, his reduction from 30 cents to 26 cents would indicate *a loss in value of 13 per cent due to the depression as against the 36 per cent determined by the Secretary.*

The value fixed by the Secretary in the first decision was very low. It was 10 cents per square foot below the value fixed by the Government appraiser and 5 cents below the value fixed by appellant's appraisers. All three of those men had had long experience in real estate business in St. Joseph. It is also to be noted in passing that in *St. Joseph Stocks Yards Co.* v. *United States,* 58 F. (2d) 290, in the footnote on page 295, a majority of the court expressed the following opinion:

> "As to the principal matters in controversy between the parties in connection with the valuation of the petitioner's property, to wit, *the value of the lands of petitioner upon which its business chiefly is conducted* and the element of going concern value, a majority of the court is of the opinion that the values found by the Secretary are against the weight of the competent evidence." (Emphasis ours).

In the second decision the Secretary fixed the value at 16 cents, being a reduction of 9 cents per square foot, or *36 per cent*, in the three year interim between the time of the first appraisal and the time of the second appraisal. Such a reduction is so serious as to require a satisfactory explanation. The following statement in the decision of this Court in *West* v. *Chesapeake & P. Telephone Co.*, 295 U. S. 662, 672-674, 79 L. ed. 1640, 1648, is quite pertinent to the present discussion of land values:

> "But it is to be remembered that such a property as that here under consideration is a great integrated aggregate of many and diverse elements; is not primarily intended for sale in the market, but for devotion to the public use now and for the indefinite future; and has, so far as its market value is concerned, no real resemblance to a bushel of wheat or a ton of iron. While, therefore, the owner of such a property must assume and may not pass on to the public the risk involved in a general decline in values, and may have the advantage also of a general rise in such values, it would not only be unfair but impracticable to adjust the value and the consequent rate of return *to sudden fluctuations in the price level. For in its essence this is the sort of aggregate whose value is not fairly or accurately reflected by such abrupt alterations in the market.* A public service corporation ought not, therefore, in a rate proceeding, to be permitted to claim to the last dollar an increased value consequent upon a sudden and precipitate rise in spot prices of material or labor. *No more ought the value attributable to its property to be depressed by a similar sudden decline in the price level.* • • • *What the Commission in effect did was to take the temporary low level of December, 1932,* and apply this low level for the indefinite future in ascertaining the so-called fair value of the company's plant and property. The experience of the two years which have elapsed since the Commission's order clearly indicates the impropriety of the use of its method in the appraisal of a property such as that of this company." (Emphasis ours).

In the present case the Secretary unquestionably took the temporary low level of 1932.

NO BASIS FOR FINDING IN THE FIRST DECISION THAT GOING CONCERN VALUE WAS INCLUDED IN LAND APPRAISAL.

In the first decision (par. 73, appendix to brief, p. 38) the Secretary said, in connection with fixing the value of 25 cents per square foot:

> "It is very clear from the record that all of these appraisers included in their valuation the going concern element inhering in the land because of its integration in, and use as a part of a going operating concern, namely, the stockyard."

There is nothing in the testimony of the appraisers on the first hearing to indicate that any going concern value had been included in their appraisals. We refer to the testimony of the Government appraiser Mack (R. 183-206) and the testimony at the same hearing of appellant's appraisers Spratt and Atkinson (R. 235-270). *Their evidence contains nothing which would indicate that their appraisal included going concern value.* It was based upon sales of adjacent land. At the time of the second hearing, both Mack and Atkinson had died. Spratt, however, whose appraisal of this land was 30 cents per square foot (lower than that of the Government appraiser) on the first hearing, was still living and again appraised the land for appellant. Upon the second hearing, Spratt specifically denied that his first appraisal of the land contained anything in the way of going concern value. He testified that that appraisal applied only to bare land value (R. 771-772). All of the appraisals, except that made by the Secretary in his present decision, were based upon actual transfers of adjacent land.

FUNDAMENTAL ERROR OF SECRETARY IN PRESENT FINDING AS TO VALUE OF LAND IN ZONE A.

Appellant can hardly expect this Court to weigh all of the testimony and the rather involved transfers and loca-

tions in an attempt to determine the truth as between the land appraisers. If, however, we are able to demonstrate one glaring and controlling mistake in the conclusion reached by the Secretary, we may be able to satisfy this Court that the Secretary erred in the value fixed for the land in zone A.

That very obvious error, both of premise and conclusion, is to be found in pars. 106, 109 and 110 of the decision (R. 81 and 83). *The Secretary fixed the value for zone A upon an analysis of the sale of the Belt Railway. The Secretary erred, both in his facts as to areas and other elements,* in undertaking to analyze the sale of the St. Joseph Belt Railway in 1929, and in applying the result of that faulty analysis to the value of land in zone A. This and other points in connection with the land values may be more readily visualized by reference to the sketch map of appellant's property at page 88 of the appendix to the brief. In paragraphs 106 and 109 the Secretary discusses this sale of the Belt Railway, attempts therefrom to analyze the land value, determines that the sale indicated a value of 18 cents in 1929, and thereafter reduces it 2 cents to indicate a value in 1932. The Secretary erred, (1) *as to the amount of land transferred in that sale,* and (2) *as to any possible application that could be made of the facts.*

For many years, appellant owned all of the capital stock of the St. Joseph Belt Railway Company, a terminal railway which served the stockyards, packing houses, and other industries in the same general area. In 1929, appellant sold the entire capital stock of the railway to other interests for $1,500,000 (par. 106 of decision, R. 81). The transfer of the capital stock carried with it the ownership of the land and all equipment of the Belt, including tracks, motive power, engine house, shops, etc. From this sale of the *capital stock* of the Belt, the Secretary undertakes.

by various improper deductions, to determine the value of the portion of the Belt Railway Company *lands* which were formerly a part of zone A of appellant's property.

The transaction was solely a sale of capital stock and as such is not evidence of the value of the component parts of the property sold. The record shows without dispute that the St. Joseph Belt Railway Company was a separate corporation and operated as a common carrier. All of its capital stock was owned by appellant and, until shortly prior to the sale, all the land upon which the railroad operated was likewise *owned* by appellant and *leased* to the railroad. The books of appellant showed an investment in the St. Joseph Belt Railway Company, in 1929, of $531,280.08 (Government exhibit 121-A, sheet 1, one of the original exhibits certified to this court). This property consisted of the usual property of a railroad other than land, such as rails, ties, ballast, engines, switches, roundhouse, etc. So far as the buyer was concerned, its purchase was entirely capital stock because at the time of the consummation of the purchase the railroad owned the land.

None of the witnesses based their appraisals on this transaction. Zelinski, the Government appraiser, disregarded it entirely (R. 541). Quinn made no particular mention of it (R. 796-813); and Spratt merely stated that the entire transaction was corroborative of his appraisal (R. 785-793).

It is difficult to see how a sale of *capital stock* can be used to fix the *value of land* when the land is only a part of the consideration transferred to the purchaser of the stock. It is a matter of common knowledge that the price of capital stocks fluctuates sharply in accordance with earnings or other conditions. To say that the selling price of the capital stock of a corporation is indicative of the value of its land is but another way of saying that the

value of the land of a railroad corporation fluctuates up and down with the increase or decline in its earnings.

The Secretary erred as to facts. Prior to the sale of the Belt Railway capital stock, appellant owned the capital stock of the railway and the land upon which it operated, the land being leased by appellant to the Belt. In order to sell the stock, it was necessary for appellant, prior to the sale, to convey to the railroad 82.356 acres of land upon which the railway at that time operated (R. 785 and 789). See also Government exhibit 128, page 112. The record shows that appellant, in its accounting for this transaction, charged $1,020,499.05 against the land and the balance against the investment in capital stock, etc.

Dividing the 82.356 acres conveyed into the $1,020,499.05 gives an average value of approximately 28 cents per square foot instead of 18 cents as stated in paragraph 109 of the Secretary's decision. *The Secretary in speaking of this land area in paragraph 106 of the decision* (R. 81) *erroneously indicates that the amount was 91.49 acres.* Thus, the *actual sale* of the land represents a value of *28 cents per square foot* and *not* a value of *18 cents per square foot* as stated in paragraph 106 of the decision. Obviously this sale would support a higher value for zone A than the 25 cents allowed by the Secretary in the first decision and much greater than the value of 16 cents in the second decision.

The analysis of the Belt sale was wholly erroneous and arbitrary. Even assuming there may be some evidentiary value to be derived from the sale of the Belt, the analysis made by the Secretary is clearly arbitrary because it contains many errors. The first is that the analysis contained in paragraph 106 of the decision *is based upon 91.49 acres of land* whereas *only 82.356 acres were transferred.*

The second error in the analysis of the Belt sale is that

the Secretary accepts as the true value of the St. Joseph Belt Railway Company in 1928 the sum of $2,500,342. *That value was never determined by anyone nor related to any sale.* It was merely the value set up by the railway in a proceeding before the Interstate Commerce Commission, (see Government exhibit 135, one of the original exhibits certified herewith). That exhibit is a brief filed by the railroad in a proceeding by the Interstate Commerce Commission to recapture excess earnings under section 15A of the *interstate commerce act* (since repealed). The law was repealed before the litigation ended. But the brief of the railroad, which is Government exhibit 135, shows that there was included in the total figure set up as value the following elements which the Secretary has declined to allow in the present case:

Cost of Assembling Capital	$211,699
Going Concern Value	311,855
Appreciation	29,000
Difference Between Cost of Reproduction New and Cost of Reproduction Less Depreciation	281,637
Total	$834,191

None of these items concerned land.

If this total figure of $834,191 be deducted from the claimed value in said brief of $2,500,342, there is left $1,666,151. The sale price of the capital stock of the Belt Railway, $1,500,000, is 90 per cent of that amount; that is to say, using principles of valuation adopted by the Secretary in this case and applying them to the contentions of the Belt in its proceeding before the Commission, its claimed value would have been $1,666,151, one of the items of which was land in the amount of $1,195,591. Even if the land value claimed in that case (30 cents per square foot) were reduced to 90 per cent, it would still leave a value of 27 cents per square foot. If the computation

made by the Secretary were continued by reducing 27 cents by the percentage which Spratt used to reduce his 1929 value to the 1932 level because of the depression, we would still have a figure of 23.4 cents per square foot resulting from any possible analysis of the Belt sale.

The conclusion of the Secretary is arbitrary because the analysis of the sale of the Belt Railway ignores the fact that 75 per cent of the Belt Railway land is not adjacent to zone A of appellant's property but is adjacent to other and less valuable zones.

It should not be expected that the average value per square foot of the land used by the Belt Railway would be equivalent to the value per square foot of the land in zone A, because the Belt extended through other zones of less value. The land map introduced by the Government, Government Exhibit 103 (one of the original exhibits certified in this case), shows the area of the Belt Railway which is adjacent to the various land zones. Only about 13½ acres, or about 16 per cent, are adjacent to zone A. (See sketch map, p. 88 of appendix to brief). Another 5½ acres are adjacent to zone A and other zones; *i. e.*, part to zone D and part to zone C. Even including this 5½ acres with the 13½ acres, there would be only 19 acres adjacent to zone A, which is slightly less than 25 per cent of all the land conveyed to the Belt Railway.

Of the balance, about 17 acres are adjacent to zone F (appraised by Zelinski at 2.3 cents, Spratt and Quinn at 5 cents); 3 acres adjacent to zone B (appraised by Zelinski at 8 cents, Spratt at 13 cents and Quinn at 15 cents); 5 acres adjacent to zone C (appraised by Zelinski at 9 cents, Spratt at 11 cents, Quinn 12½ cents, and valued by the Secretary at 10 cents); and about 38 acres are bounded on the east by zones E (appraised by Zelinski at 7 cents, Spratt at 11 cents, Quinn at 10 cents, and valued by the Secretary

at 10 cents); and D (appraised by Zelinski at 9 cents, Spratt at 15 cents, and Quinn at 12½ cents); on the north by Larabee Mill Tract, which is adjacent to zones C and N (valued by Zelinski and Spratt at slightly less than 7 cents, Quinn at 8 cents, and by the Secretary at 7 cents); on the south by zone F, and on the west by the Union Terminal right of way which adjoins zones J (valued by Zelinski at slightly less than 2 cents, and Spratt and Quinn at 2 cents), and K (valued by Zelinski at slightly over 1 cent, Spratt at ¾ cents, and Quinn at 1 cent).

This latter tract of land (38 acres) certainly is not adjacent to land of appellant which any of the appraisers have appraised on an average of any higher value than 11 cents per square foot when the unit values of all the abutting zones are considered. Using that figure, 11 cents per square foot for the 38 acres, 5 cents for the 17 acres, 13 cents for the 3 acres, and 11 cents for the 5 acres, produces a weighted average appraised unit value of 10 cents per square foot for the zones of appellant which are adjacent to three-fourths of the land of the Belt. Assuming that the fair value of the land adjacent to three-fourths of the land of the Belt Railway is 10 cents per square foot and that the entire land of the Belt Railway is worth an average of 15.6 cents per square foot, the figure adopted by the Secretary, that would make the one-fourth adjacent to zone A worth 32.4 cents per square foot. In other words, even under the erroneous analysis adopted by the Secretary, we would arrive at a value in excess of 30 cents per square foot if consideration were given to the fact that most of the land conveyed to the Belt is *not* adjacent to zone A, but *is* adjacent to less valuable land of appellant.

Still another error of the Secretary in analyzing the sale of the Belt Railway was that he absolutely ignored the fact that *appellant paid the United States Government income tax on the basis of the sale of 82.356 acres at $1,020,-*

499.05, or an average of 28 cents per square foot. One of Government counsel investigated this matter at the office of the Bureau of Internal Revenue in Washington and a copy of his report is included in Government exhibit 128, pages 112 and 113, an original exhibit certified in this case. From this report, it appears that the Bureau of Internal Revenue accepted as a fact appellant's allocation of the purchase price of the $1,500,000 received by it for the Belt Railway stock. Not only did it accept appellant's allocation but appellant paid and the Bureau of Internal Revenue accepted a substantial amount as income tax by reason of that sale. Counsel for the Government may argue that appellant could have apportioned the sale price in any manner it saw fit; however, such a contention loses weight when it is undisputed that appellant paid income tax on the basis of the allocation and that the income tax was accepted by the Bureau of Internal Revenue after a thorough investigation of the matter.

If any conclusion is warranted from this entire transaction, it is that the sale is evidence of an average value of 28 cents per square foot for the land covered by it, which figure is derived by dividing the amount of $1,020,499.05 by 82.356 acres.

It is apparent that the Secretary fixed the value in zone A solely upon his analysis of the sale of the Belt Railway land. It is also apparent that he utterly misconstrued that sale, using a sale price of capital stock to represent land value, using erroneous acreage, and making the other errors above outlined. Unquestionably, that sale was at an average value of 28 cents per square foot and, if it justifies anything at all in this case, it justifies a finding of 28 cents per square foot as the value for zone A. The fact that the Secretary, after an analysis of all of the real estate evidence, fixed the value of zone A in connection with this sale definitely proves the error of his valuation.

THE FINDING OF THE SECRETARY IS ARBITRARY BECAUSE IT IGNORES THE FINDING IN THE FIRST DECISION.

In the first decision (par. 73, appendix to brief, p. 38) the Secretary found that zone A had a value of 25 cents per square foot. In the present decision, he finds (par. 110, R. 83) that it has a value of 16 cents per square foot. Even assuming that some reduction should be made by reason of the depression, and reducing 25 cents by the percentage adopted by the Secretary in paragraph 110, of 13 1/3 per cent, zone A would still have a value of 22 cents per square foot.

There is no sound reason why values should be reduced by so much as 36 per cent by reason of the depression, because the Secretary several times states that the values he has fixed in this proceeding are normals and not depression values. For example, in paragraph 6h (R. 29) he states:

> "In determining the values used as the rate base, depression or stagnation values carefully have been avoided and normals used."

Again in paragraph 110 (R. 83) he states:

> "It is further found that this value (16c for Zone A) does not represent depression or stagnation value but constitutes the reasonable normal value of the land, giving weight to values existing immediately preceding as well as those existing during the present depression."

Even if some reduction should have been made at the time of the hearing because of the depression, the tremendous reduction of 36 per cent can not be justified because of the general improvement in conditions since the hearing. *West* v. *Chesapeake & P. Teleph. Co.* 295 U. S. 662, 79 L. ed. 1640. The fact that this improvement has occurred is admitted by the Secretary in paragraph 6h, where he states:

> "It now seeks another (hearing) because since the

> last hearing there has been a general improvement in those conditions (economic conditions causing depression)."

In this connection, it should be noted that when the previous case was before the same District Court in *St. Joseph Stock Yards Co.* v. *United States,* 58 F. (2d) 290, 295, a majority of the court was of the opinion:

> "that the values found by the Secretary are against the weight of the competent evidence."

It should be remembered that the finding of a value of 25 cents per square foot for zone A in the first decision was the conclusion of the Secretary after weighing the evidence of three witnesses, two of whom were of the opinion that zone A had a value of 30 cents per square foot, and a third that its real and true value was 35 cents per square foot (R. 185, 246, 253, 267).

THE SECRETARY HAS DISREGARDED THE LAW ANNOUNCED BY THIS COURT CONCERNING THE ELEMENTS TO BE DETERMINED IN FIXING LAND VALUES.

It is quite evident from the decision of the Secretary (pars. 93-111, inclusive, R. 70-84) that he adopted the views taken by the Government land witness, Zelinski, at the last hearing (R. 472-568) to the effect that he (the land appraiser) should ignore and not consider the intensity of the use made of appellant's land and the fact that it was peculiarly adapted to its present use (R. 502, 503, 504, 507). Zelinski stated that, if this theory were wrong, his approach to the appraisal was wrong (R. 507). In that connection, he referred to *Minnesota Rate Cases,* 230 U. S. 352, 57 L. ed. 1511. The only rule there stated, applicable here, was that the railroad would have no ground for complaint *if it were allowed a value for its land equal to the fair average market value of similar land in the vicinity;* and that, if a property had a peculiar value or special adapta-

tion for railroad purposes, that would be an element to be considered.

The record shows that all three land appraisers considered the same transactions or transfers, numbered 1 to 147, inclusive, and included in Government exhibit 128, one of the original exhibits certified in this case. In respect to zone A, Zelinski stated:

> "There are no sales of strictly similar lands in the vicinity of this zone." (R. 523).

If that is true, Zelinski's appraisal is not and cannot be based on sales of similar land in the vicinity because there was no such land. In his appraisal report, he claimed a certain sanctity for his appraisal because it was based upon the rule prescribed by this Court in *Minnesota Rate Cases, supra.*

Although Zelinski stated that there were no sales of strictly similar lands in the vicinity of zone A (R. 523), he testified that he gave consideration to 23 transfers in arriving at his unit value for zone A (R. 523, p. 22 of Government exhibit 128). The transfers here mentioned are indicated on the sketch at p. 88 of the appendix to the brief.

But 15 of said 23 transfers are adjacent or in the immediate vicinity of zone A. *The weighted average of these 15 transfers is 36.4 cents per square foot.* Two of this group, sales 34 and 35, were of swampy land and the record shows that none of zone A is swampy land. If these two sales were eliminated as being not similar, the weighted average unit price would be 46.5 cents per square foot.

It is interesting to note in this connection that Zelinski failed to mention probably the closest transaction to zone A of all of the 147 transactions listed in Government exhibit 128. This transaction is covered by his sale sheet no. 22 and shows a unit price of 35 cents per square foot. The

property covered by this transaction is immediately adjacent to appellant's sheep truck docks in the northeast corner of zone A.

It is quite evident that the Secretary, in fixing the unit value for zone A, has utterly disregarded these 15 transfers which are in the immediate vicinity of the zone because otherwise he would have arrived at a unit price of approximately 35 cents per square foot. It is quite evident that the Secretary disregarded the indisputable evidence and based his unit values for zone A upon his erroneous analysis of the sale of the Belt Railway.

If the *15 transfers which are in the immediate vicinity of zone A* are eliminated from the 23 transfers listed by Zelinski, there remain but 8. One of these, 53-A, Zelinski later stated that he disregarded (R. 534). This leaves but 7 of which 5 are adjacent to zone N. Zone N is somewhat removed from the main body of the stockyards, is vacant and devoted to farming. (Item 39, Government exhibit 107-A, certified in this case.) The character of the small portion of it which is used is best demonstrated by the fact that it is used for manure disposal. The record clearly shows that the land in the vicinity of zone N is from four to five feet lower than the land in zone A. (Respondent's (appellant's) exhibits 114 and 115, certified herewith.) The record further shows that the land in zone A had been filled in substantially that amount at the time the stockyards were originally constructed. (R. 625-632, 636-639, 587; respondent's exhibits 113 and 115). The record further shows that it would be necessary to fill zone N in substantially that amount if it were to be used for structures of the character and type of those found in zone A (R. 589). The record further shows that it would cost 18.5 cents per square foot to bring zone N to a level comparable to zone A (R. 589). These statements are absolutely undisputed in the record. The Secretary has found

that zone N has a value of 7 cents per square foot. If the additional 18.5 cents were added, this would make a value of 25.5 cents for zone A which is practically the unit value fixed by Spratt and slightly in excess of the average of the three appraisers.

The above comments respecting zone N refer to the 5 transfers which are listed as adjacent to zone N. They are referred to in paragraph 102 of the decision of the Secretary as being in the second and third groups. These two groups are on the southern and western borders of zone N. Transfer 10 lies between zone N and zone C.

The remaining two transfers considered by Zelinski, and by the Secretary, likewise are adjacent to other zones of appellant's property. Transfer 5 is immediately adjacent to zone C which the Secretary values at 10 cents per square foot. Transfer 5 was at 11.5 cents per square foot, and it is undisputed that the grantor owned all of capital stock of the grantee at the time of the transfer (R. 873). Transfer 6, together with others in that vicinity and referred to in paragraph 103 of the decision as the "Grain Belt Mills Sales", is adjacent to zones L and K and is substantially removed from zone A. None of the properties involved in these transfers are at all comparable to the property of appellant in zone A from the point of view of *accessibility, type of trackage,* and *possibilities of use* (R. 593-595, 525, 526, 528, 532, 534).

For the reasons stated, it is respectfully submitted that the land value determined for zone A by the Secretary in the present decision is, as alleged in the petition in the District Court, (1) unsupported by the evidence; (2) contrary to the weight of the evidence and to the indisputable character thereof; (3) arbitrary; and (4) confiscatory; and that the failure of the District Court so to find, together with its refusal to exercise its independent judgment upon the law and the facts, is reversible error.

XVI.

THE DISTRICT COURT ERRED IN ITS DECISION CONCERNING APPELLANT'S PETITION FOR REHEARING BEFORE THE SECRETARY.

That portion of the opinion of the District Court relating to appellant's petition to the Secretary to reopen this proceeding is found on pages 324 and 325 of 11 F. Supp., commencing on page 324 under the caption "I. Application to Reopen" and continuing through to the caption "II. Confiscatory Character of Rate Order" on page 325. The error of the District Court is specified in assignments of error nos. 1, 2, and 3 (R. 150-151) and is summarized in paragraph 1 of appellant's statement of points to be relied upon in this court. (R. 938).

Facts relating to petition to reopen. On February 2, 1934, appellant filed with the Secretary a petition entitled "Petition for Reopening and Further Hearing". A copy of this petition appears at pages 15-19, inclusive, of the record. The petition was denied in the decision of the Secretary entered May 4, 1934. Paragraphs 6c-6h of the decision (R. 26-29) are devoted to a discussion of said petition for rehearing, *and in it are incorporated certain findings of fact not taken from the record before the Secretary.* The record in this proceeding before the Secretary (hearing January 10-February 16, 1933, inclusive) ended with the result of appellant's operation for the year 1932. See decision of Secretary (R. 24-131, particularly "Other Expenses", par. 181, R. 120, par. 195, R. 123, and par. 203, R. 127). Nevertheless, upon receipt of appellant's petition for further hearing, the Secretary made an investigation of his own, as a result of which he made certain findings of fact in paragraphs 6c-6h, inclusive, of the decision

(R. 26-29). In paragraph 6e of the decision, the following statement is made by the Secretary:

> "Investigation has been made of the allegations in Paragraph II of respondent's petition respecting increases in respondent's operating expenses through increased compensation to its employees, brought about by the Governmental program for industrial recovery and through the recovery which has resulted from that program. This investigation consisted chiefly of ascertainment by accountants of the Department of Agriculture from respondent's records of the amounts expended as compensation to employees since the alleged increases and a comparison of these amounts with the allowances in the proposed order to cover such expenditures."

That this *ex parte* investigation by the Secretary was made over the protest of appellant appears in the following sentence also from paragraph 6e of the decision:

> "The investigation was made over the protest of respondent that to consider the result of it, without giving respondent opportunity to cross examine the Department's accountants and to present evidence on its own behalf, would deny to it the full hearing provided by the Packers and Stockyards Act, 1921, and would invade its constitutional rights."

Furthermore the court incorporated in its opinion certain of these *ex parte* findings made by the Secretary:

> "the result being that this court adopts the findings of facts made by the Secretary."
>
> 11 F. Supp., 322, at p. 338.

In the portion of its decision dealing with the petition for rehearing, the court also included one specific finding (p. 325) apparently based upon this *ex parte* investigation by the Secretary, reading as follows and covered by assignment of error no. 3:

> "As to the estimated effect of these rates if applied to 1933 business, the difference between the amount which is claimed would have been earned thereunder

and the amount found by the Secretary to constitute the reasonable net return is too small to be taken as a guide for a rate."

This finding of the court cannot be based upon anything other than the *ex parte* findings of the Secretary because no evidence was introduced in the hearing before the Secretary dealing with any period after the close of the calendar year 1932.

Error assigned with respect to petition for rehearing. The error assigned with respect to the petition for rehearing may be summarized under three points:

(1) By reason of the *ex parte* investigation of the Secretary and the incorporation into the report of facts known only to him, if indeed they are facts, appellant was deprived of its statutory and constitutional rights by reason of the fact that the Secretary, over the protest of counsel for appellant, proceeded to make findings of fact upon an *ex parte* investigation and to incorporate in his findings facts assumed to be known to him but not developed in a hearing.

(2) The District Court erred in adopting as its own such findings of the Secretary which, as stated in the decision of the Secretary, were made on an *ex parte* investigation by the Secretary's employees without affording appellant an opportunity to examine, cross-examine, explain, or rebut. Thus the Secretary and the District Court included certain fundamental and controlling findings of fact not supported by any legal evidence.

(3) The circumstances were such that the petition for rehearing should have been granted.

(a) A petition to the Secretary for rehearing or reopening was the only method open to appellant to show changed conditions, or impending changes, which would reduce appellant's business and therefore its revenue. *Tagg Bros. & Moorhead* v. *United States*, 280 U. S. 420, at pages 444-445, 74 L. ed. 524, at page 537.

(b) The Secretary might have allowed or denied the petition as he saw fit, but he had no right to make, nor did the District Court have the right to adopt, findings of fact adverse to appellant made upon an *ex parte* investigation wherein appellant was not permitted to appear, had no right to examine or cross-examine witnesses, or to explain or rebut the assumed facts gathered by employees of the Secretary. This was a violation of a fundamental right declared by this Court in many decisions under the *interstate commerce act.*

The point here presented was considered by this Court in *Interstate Commerce Com.* v. *Louisville & N. R. Co.*, 227 U. S. 88, 57 L. ed. 431. In that case, the Government insisted that the Commission could act upon information gathered in the general performance of its duties, even though such information was not incorporated in the record in the specific case before it, and that its findings must be presumed to have been supported by such information even though not formally proved at the hearing. This contention was condemned by the Court which said, at page 93:

> "But such a construction would nullify the right to a hearing,—for manifestly there is no hearing when the party does not know what evidence is offered or considered, and is not given an opportunity to test, explain, or refute. The information gathered under the provisions of § 12 may be used as basis for instituting prosecutions for violations of the law, and for many other purposes, but is not available, as such, in cases where the party is entitled to a hearing. * * * In such cases the Commissioners cannot act upon their own information, as could jurors in primitive days. All parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents, and to offer evidence in explanation or rebuttal. In no other way can a party maintain its rights or make its defense. In no other way can it test the sufficiency of the

> facts to support the finding; for otherwise, even though it appeared that the order was without evidence, the manifest deficiency could always be explained on the theory that the Commission had before it extraneous, unknown, but presumptively sufficient information to support the finding."

This principle was restated in *Florida E. C. R. Co.* v. *United States,* 234 U. S. 167, 185, 58 L. ed. 1267, 1271.

Substantially the same rule was stated in different language in *Baltimore & O. R. Co.* v. *United States,* 264 U. S. 258, 265, 68 L. ed. 667, 674, as follows:

> "The provision for a hearing implies both the privilege of introducing evidence and the duty of deciding in accordance [illegible]. To refuse to consider evidence introduced, or to make an essential finding without supporting evidence, is arbitrary action."

The same rule was applied in setting aside an order of the Interstate Commerce Commission in *United States* v. *Abilene & S. R. Co.,* 265 U. S. 274, 68 L. ed. 1016.

To the same effect are *Crowell* v. *Benson,* 285 U. S. 22, 48, 76 L. ed. 598, 611, and *Southern R. Co.* v. *Virginia,* 290 U. S. 190, 195, 78 L. ed. 260, 264.

That this *ex parte* finding by the Secretary was prejudicial to appellant is very evident from the finding of the District Court quoted on pp. 177, 178.

(c) *The petition for further hearing should have been allowed.* By far the most important allegation set up in the petition for rehearing was that relating to the effect of the *agricultural adjustment act* (May 12, 1933, U. S. C. A. tit. 7, §§ 601-619) upon the receipts of live stock at all markets and at appellant's stockyards. Appellant's principal revenue is from yardage, that is, the charge for the receipt, handling, care, and custody of animals in its possession. In paragraph 208 of the Secretary's decision (R. 129), it is estimated that under the rates

prescribed by the Secretary the yardage charges would produce $412,775 out of a total gross revenue of $621,831. Of this yardage, the decision predicted that $150,250 would result from yardage on hogs (this estimate being based upon the Secretary's assumption that 1,206,250 hogs would be received by truck at a charge of 12 cents and 68,750 hogs would be received by rail at a charge of 8 cents, pars. 201 and 207 of Secretary's decision, R. 126, 128). The estimate of the Secretary (1,275,000 hogs) exceeded the actual receipts for 1932 (the last year covered by the hearing, see par. 195 of decision, R. 124) of 1,148,990, by 126,010 head of hogs. In other words, the order was based upon the prophecy by the Secretary that appellant's receipts of hogs, and consequently its yardage revenue therefrom, would increase.

But when the petition for further hearing was filed on February 2, 1934, the *agricultural adjustment act* had been in effect nearly a year. The purpose of that law was to reduce the production of hogs (and certain other agricultural products). At the time appellant's petition for rehearing was filed, the Secretary had announced his intention to reduce the production of hogs by 25 per cent. A bulletin was issued entitled "U. S. Department of Agriculture, Office of Information, Press Service, Washington, D. C., Agricultural Adjustment Administration, Release—Immediate, July 2, 1934, AAA Program Major Factor in Adjustment of Hog Numbers." This bulletin stated:

> "On the basis of the 1934 pig crop estimates, the hog slaughter under Federal inspection during the 1934-35 hog marketing year beginning next November is expected to be the smallest in many years and may be as small as it was in 1914-15 when it was 36.7 million head. Federally inspected hog slaughter during the 1932-33 marketing season was about 47 million head, one of the five largest totals on record."

These are facts which could have been proved in re-

buttal of the statement in the Secretary's decision (par. 6d, R. 27) that "these programs presently are experimental" if appellant had been offered an opportunity.

This coincidence of circumstances brought about the following very contradictory and inconsistent situation with respect to activities being carried on at one and the same time under the direction of the Secretary. When the Secretary entered the order in this case on May 4, 1934, he stated in paragraph 6d of the decision (R. 27) that "the programs for recovery * * * by controlling agricultural production * * * presently are experimental". But at the same time he was stating in other documents, such as those above mentioned, that the administration of the *agricultural adjustment act* had been so far successful that for the coming season the number of hogs marketed would be "the smallest in many years". The District Court says that the results of the administration of the *agricultural adjustment act* are "purely speculative". Certainly as to hog production that statement is contrary to common knowledge.

It is unfortunate that, due to the necessary lapse of time, the records in cases of this kind when they reach this Court always lag behind the march of events. The result under the *agricultural adjustment act* in the reduction of live stock receipts exceeded the predictions of the Secretary. We point to the following facts, not as evidence before this Court, but as showing what would now be proved if the case were reopened for further hearing. The results of appellant's operations for 1935 are shown below.

	Receipts Predicted by Secretary (Par. 201)	Received by appellant in 1935	Deficit below number predicted by Secretary
Cattle	400,000	354,780	45,220
Calves	85,000	99,448	* 14,448
Hogs	1,275,000	658,284	616,716
Sheep	1,200,000	994,076	205,924

* Excess

	Other estimates by Secretary.	Actual revenue in 1935 at rates prescribed by Secretary.	Deficit.
Resale charge	$ 25,775	$ 5,424.53	$ 20,350.47
Feed lot yardage	35,984	23,140.20	12,843.80
Feed profit	82,800	67,709.28	15,090.72
Loading and unloading charges	22,500	16,401.25	6,098.75
Miscellaneous charges	68,000	56,065.59	11,934.41
Yardage	375,000	276,833.83	98,166.17
			$164,484.32

Results for 1935.

Minimum fair return determined by Secretary (par. 171, R. 116) $192,010.00

Actual net return in 1935, using only expenses allowed by Secretary, including depreciation reserve of $41,500, under appellant's *present rates* 90,324.53

Deficit below fair return determined by Secretary 101,685.47

Actual net return in 1935 *if rates prescribed by Secretary had been in effect* 54,789.91

Deficit below fair return in 1935 if rates prescribed by Secretary had been in effect.... 137,220.09

Rate of return under *present* rates in 1935 on fair value fixed by Secretary ($90,324.53 ÷ $2,743,000, par. 161, R. 112) ..... 3.29 per cent

Rate of return in 1935 if rates prescribed by Secretary had been in effect ($54,789.91 ÷ $2,743,000) ..... 1.99 per cent

It would indeed be a strange miscarriage of justice if, under these conditions, appellant were now required to

establish the rates prescribed by the Secretary and to refund all of the charges in excess of the prescribed rates since the date of the Secretary's order. The result would be, under the bond in this Court, that during a year (1935) when appellant's net operating income was only 3.29 per cent under its present rates upon the value determined by the Secretary and would have been only 1.99 per cent under the rates prescribed by the Secretary, a refund approximating $200,000 would have to be made to the patrons of the yards *upon the theory that the return had actually exceeded 7 per cent upon the fair value determined by the Secretary.*

This situation, as pertains to appellant's receipts of live stock and revenue, is not changed by the decision of this Court of January 6, 1936, in *United States* v. *Butler*, ... U. S. ....., 80 L. ed. (Adv. Ops.) 287. For 1935, the result sought under the *agricultural adjustment act* is an accomplished fact. Other legislation to the same end is being considered. In any event it would be several years before live stock production could return to normal. It will be time enough to order a reduction in appellant's charges after it is earning, if ever, something above a confiscatory return on the minimum value which may be determined for its property.

It is respectfully submitted that the petition for rehearing should have been granted; and that, if upon the points already raised this court does not decide that the decree of the District Court should be reversed, this court should at least require the case to be reopened and the bond to be discharged in order to afford appellant an opportunity to show that the rates prescribed by the Secretary, confiscatory when made, would be even more confiscatory at the present time.

CONCLUSION.

Because of the errors of fact and law to which the attention of this Court has been called, the decision and decree of the District Court should be reversed.

Respectfully submitted,

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January, 1936.